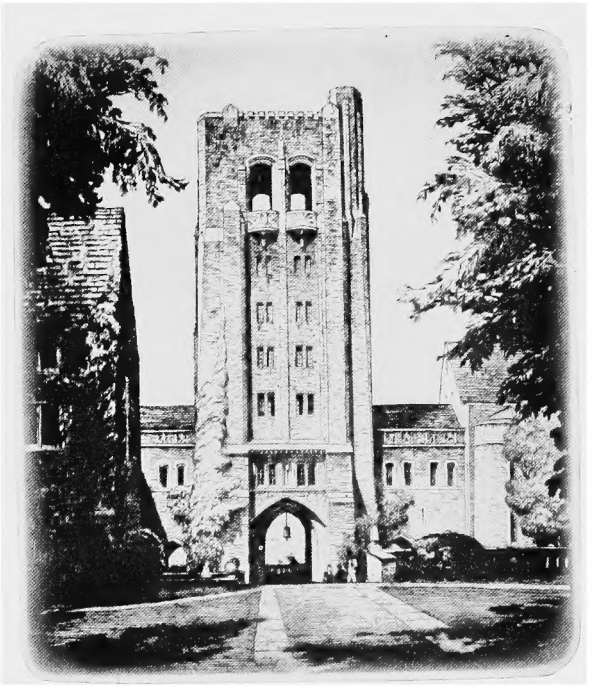
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[*From Prof. Parsons of the Cambridge Law School.*]

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BY

THEOPHILUS PARSONS, LL. D.,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, AT CAMBRIDGE.

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HON. JOEL PARKER, LL. D.,

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY,

AND FORMERLY

CHIEF JUSTICE OF THE SUPERIOR COURT OF NEW HAMPSHIRE,

I DEDICATE THIS VOLUME,

IN ACKNOWLEDGMENT OF THE URBANITY AND DEVOTION TO DUTY WHICH HAVE MADE OUR COMMON SERVICE VERY AGREEABLE TO ME; AND IN TESTIMONY THAT THE LEARNING AND WISDOM THAT ILLUSTRATED THE HIGH JUDICIAL OFFICE FROM WHICH HE CAME HERE, HAVE MADE HIM MOST USEFUL AND MOST ACCEPTABLE TO ALL WHO ARE OR HAVE BEEN IN ANY WAY CONNECTED WITH THE SCHOOL, AND HAVE INSPIRED AN EARNEST HOPE THAT HIS CONNECTION WITH IT MAY LONG CONTINUE.

THEOPHILUS PARSONS.

CAMBRIDGE, July, 1856.

PREFACE.

THE title of this work indicates its purpose and character; but as they are in some respects peculiar, a few remarks respecting them may make the volume more useful.

When I accepted, seven years ago, the office of Dane Professor in the Law School of Harvard University, it was my expectation that my official duties would leave me some leisure which I could usefully employ in making a series of text-books on Commercial Law. I had for many years been much employed in examining questions belonging to that department of the law, and had formed the opinion that text-books might be made better suited to the wants of the profession than those we had. Their general merit, and the high excellence of some of them I knew; but it seemed to me that they had faults which might be avoided, and deficiencies which might be supplied. The necessary basis for such a series was a work on the Law of Contracts generally. This I have made; and I may perhaps be permitted to say, that the reception it has met with, while it does not blind me to its deficiencies, encourages me to believe that further labors of the same character would not be useless or unacceptable to my professional brethren. And it is my purpose and hope to execute fully my original plan. But the remarks that have reached me in relation to that work from various quarters, and some other circumstances, have suggested to me, or rather confirmed me in, an opinion that has led me to turn aside somewhat from my first design, and prepare this

volume. I can hardly say indeed whether my own experience suggested the idea of the present work, or only confirmed and illustrated that which was presented by others. I am certain, however, unless my experience differs altogether from that of others, that it would be a great convenience for any lawyer to have at his elbow, or to carry with him on a circuit, a single volume which would at once refresh, or confirm, or correct his recollection, or otherwise supply the want of the moment in telling him simply and concisely whatever the law has settled upon the exact question before him, or the question that comes nearest to it. Such a book would deserve the old name of "The Lawyer's Manual," or "The Attorney's Vade Mecum." The books which formerly bore these names were useful in their day. But that was a day in which it was not thought well that learning and labor should embody themselves in any other works than those of appropriate magnitude and dignity. This volume, however, contains the results of whatever learning I have been able to acquire from books or practice; and of my own earnest and continued endeavors, as well as a large amount of skilled labor, which many young friends, new to the profession, but bringing to it clear, vigorous and well-trained minds and enthusiastic industry, have permitted me to buy of them. My general purpose may be stated thus: I wished to make a full, condensed, and accurate epitome of Commercial Law.

As to the execution of the work, I know that it has many faults; and there may be many more than I am aware of, and some of these may be important. But I also know that it is just as good as I am able to make it, with the very valuable assistance I have been able to procure. I venture to hope that it will be found that very few principles which can be gathered from authority, are omitted in the text; and that the leading cases are so carefully selected, and grouped, and accurately cited in the notes, that the lawyer who consults

it on any point, will find prepared for him a brief which will enable him to pursue his investigations to any extent.

To the wants of the student, also, such a book should be exactly adapted. All who teach the law as a profession soon become aware, that the student should acquire a general and comprehensive view of the whole system of law, before he enters upon the special study of any of its parts. For that purpose we now use the Commentaries of Blackstone and of Kent; and for this purpose they will undoubtedly continue to be used. But if the student then proposes to enter upon the study of mercantile law, I am very certain that he would be greatly aided by such a book as I have above described.

I have dwelt in my own mind on this ideal, until it seemed to me certain that such a book could be made; and that it would be useful if made tolerably well; and possible that I could make it, or at least, by my own failure, suggest to another how to succeed. And in this volume I have done all that I could do to embody this ideal.

It may be well, perhaps, that I should add a word concerning the order in which the topics of this work are arranged. All mercantile business begins with or terminates in contracts of some kind, either express or implied, executed or to be executed. And as the first and most obvious necessity for all contracts is *parties*, the law in respect to them is first presented. Then it is necessary that the parties should meet together by their *assent* to the same thing in the same sense; and this is the subject of the second chapter. Then follows the further necessity, that the bargain should be founded upon a proper, a sufficient, and a legal cause, or *consideration*, and should propose a legal result; and the rules on this subject are presented in the third chapter. Every contract must have its own subject-matter; and those of the various contracts usually made by men in trade are considered in the subsequent chapters in that order, so far as

I could discover it, in which each one would lead most naturally to the next, and facilitate the study of it.

The law of Shipping and the law of Insurance are in the last chapters. They are especially distinct from the other topics, and are, as it seems to me, more closely connected with each other than is usually supposed; for I believe the law of Marine Insurance can only be understood as it is seen in its relation to the law of Shipping. It might seem presumptuous to attempt to give, in the third part of a single volume, any useful views of topics so extensive as are Shipping and Insurance. But the large works which relate to them are, very properly, filled with cases, and with elaborate discussions of unsettled questions. And I believe the reader will find that I am justified in assuring him that these chapters contain — with due allowance for the inevitable failure in the execution of one's own plan — all the general principles contained in the larger works on those subjects.

Chapters on Fire Insurance and on Life Insurance follow that on Marine Insurance. That they should have this place if any, is obvious, because all the principles of the former grow out of those of Marine Insurance, modified as the exigencies of the subject-matter require. If a reason is asked for treating of them at all in a work on the Elements of Mercantile Law, perhaps it may be found in the fact that a very large proportion of our men of business now enter into these most beneficial contracts for the preservation of their means, the payment of their debts, and the comfort of those for whom they should provide. And it may be permitted to add, that if, by placing these topics in this work and in this connection, I do anything towards making these wise precautions more universal, this of itself would authorize my believing that the book was not wholly useless.

It will be noticed that many of the topics in this volume are treated of in my work on Contracts; and that many similar statements are made in relation to those topics. Of

course, if there were a hundred works by different authors on the same subject, as on the law of Sales, for example, there must be much matter common to them all, because any book which did not contain it would be fatally defective. But the character and object of this book are very different from that of the other, and every word has been written with an effort to adapt it to its especial object.

I now offer it to the Profession, with every reason to believe that they will receive it with kindness; and will do full justice to any merit it may possess.

T. P.

Cambridge, July, 1856.

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ELEMENTS

OF

MERCANTILE LAW.

ELEMENTS

OF

MERCANTILE LAW.

CHAPTER I.

OF THE PARTIES TO MERCANTILE CONTRACTS.

SECTION I.

WHO MAY BE PARTIES TO MERCANTILE CONTRACTS.

It was once the doctrine of the English courts, that the law merchant did not apply to any contracts between parties who were not merchants.[1] But this view passed away;[2] and it has long been a well-established rule in that country as well as this, that the law merchant applies to mercantile contracts, such as negotiable notes, bills of lading, charter parties, policies of marine insurance and the like, whoever may be the parties to them.

All mercantile transactions begin or end in contracts of some kind; express or implied; executed or to be executed; and the first essential element of every contract is the existence of parties capable of contracting. Generally, all persons may bind themselves by contracts. Whoever would resist a claim

[1] Oaste *v.* Taylor, Cro. Jac. 306; Eaglechilde's case, Hetley, 167.
[2] Barnaby *v.* Rigalt, Cro. Car. 301; Woodward *v.* Rowe, 2 Keble, 105, 132.

or action founded on his contract, and rests his defence on the ground of his incapacity, must make this out.[1]

The incapacity may arise from many causes; as from insanity; or from being under guardianship; or from alienage in time of war; or from infancy; or from marriage. Of infants and married women we must speak in some detail.

SECTION II.

OF INFANTS.

All are infants, in law, until the age of twenty-one. But in Vermont,[2] in Maryland,[3] and perhaps one or two other States, women are considered of full age at eighteen, for some purposes.

The contract of an infant (if not for necessaries) is voidable. That is, he may disavow it, and so annul it, either before his majority, or within a reasonable time after it.[4] As he may avoid it, so he may ratify and confirm it. He may do this by word only. But a mere acknowledgment that the debt exists is not enough.[5]

[1] Leader *v.* Barry, 1 Esp. 353; Jeune *v.* Ward, 2 Stark. 326. And if the plaintiff reply to a plea of infancy, that defendant, after he became of age, confirmed the promise, he need only prove a promise at any time before the commencement of the suit, and the defendant must then show that he was under age at that time. Bigelow *v.* Grannis, 4 Hill, 206; Bay *v.* Gunn. 1 Denio, 108; Hartley *v.* Wharton, 11 Ad. & E. 934; Borthwick *v.* Carruthers, 1 T. R. 648. And see Harrison *v.* Clifton, 17 Law Jour. Ex. 233.

[2] See Sparhawk *v.* Buell, 9 Vt. 42.

[3] Davis *v.* Jacquin, 5 H. & J. 100.

[4] The rule that those contracts are voidable only which are for the infant's benefit, while those which are prejudicial are absolutely void, is adopted and recognized by many authorities. See United States *v.* Bainbridge, 1 Mason, 71, 82; Keene *v.* Boycott, 2 H. Bl. 515; Baylis *v.* Dineley, 3 Maule & Selwyn, 477; Latt *v.* Booth, 3 Carr. & Kir. 292; Kline *v.* Bebee, 6 Conn. 494; McMinn *v.* Richmonds, 6 Yerger, 9; Wheaton *v.* East, 5 id. 41; Ridgley *v.* Crandall, 4 Maryl. 435; Fridge *v.* The State, 3 G. & J. 104; McGan *v.* Marshall, 7 Humph. 121; Rogers *v.* Hurd, 4 Day, 57; Lawson *v.* Lovejoy, 8 Greenl. 405; Vent *v.* Osgood, 19 Pick. 572. But this distinction we suppose to be practically obsolete, the more recent authorities holding that all acts and contracts of infants, (except, perhaps, the appointment of an attorney,) are *voidable* only, and not absolutely *void*. See Cole *v.* Pennoyer, 14 Ill. 158; Fonda *v.* Van Horne, 15 Wend. 631; Breckenbridge's Heirs *v.* Ormsby, 1 J. J. Marsh. 236; Scott *v.* Buchanan, 2 Humph. 468; *Parke*, B., in Williams *v.* More, 11 M. & W. 256; 1 Am. Leading Cases, 103. Much of the uncertainty upon this question has arisen from a vague and indefinite use of the words "void" and "voidable." The student will find an admirable criticism upon these words by Mr. Justice *Bell*, in the case of The State *v.* Richmond, 6 Fost. 232. An infant cannot, however, avoid his conveyance of real estate until he becomes of age. Zouch *v.* Parsons, 3 Burr. 1794; Roof *v.* Stafford, 9 Cow. 626. But he may avoid a sale of chattels. Carr *v.* Clough, 6 Fost. 280; Bool *v.* Mix, 17 Wend. 119; Shipman *v.* Horton, 17 Conn. 481; Mathewson *v.* Johnson, 1 Hoff. 560.

[5] In England, by stat. 9 Geo. 4, c. 14, § 5, and in Maine, and perhaps some other States,

It must be a promise to pay the debt; or such a recognition of the debt as may fairly be understood by the creditor as expressive of the intention to pay it; for this would be a promise by implication.[1] It must also be made voluntarily, and with the purpose of assuming a liability from which he knows that the law has discharged him.[2] And if it be a conditional promise, the party who would enforce it must prove the condition to be fulfilled.[3]

by a similar statute, it is necessary that the new promise or confirmation should be in writing, signed by the party to be charged thereby. Under this statute it has been decided, that any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification. Harris *v.* Wall, 1 Exch. 122; Mawson *v.* Blane, 10 id. 206; Hartley *v.* Wharton, 11 Ad. & E. 934. It seems to have been held in Baylis *v.* Dineley, 3 M. & S. 477, and intimated in Clamorgan *v.* Lane, 9 Missouri, 446, that a bond or other sealed instrument given by an infant could not be confirmed by parol, after full age. But the better authorities would seem to hold, that any act of an infant, from which his assent to a deed executed during his minority may be inferred, will operate as a confirmation. See Wheaton *v.* East, 5 Yerger, 41; Hoyle *v.* Stowe, 2 Dev. & Bat. 320; Houser *v.* Reynolds, 1 Hayw. 143. As to what words are sufficient to constitute a ratification, in Hale *v.* Gerrish, 8 N. H. 374, it was proved that the defendant, after he became of age, admitted that he owed the debt, and said that "the plaintiff ought to get his pay," but refused to give a note lest he might be arrested. *Held* that such declaration was no sufficient ratification of the original promise. And in Thrupp *v.* Fielder, 2 Esp. 628, it was held that paying money generally on account of a bill was not sufficient, but that in order to constitute a ratification, there must be an express promise to pay. And see Ford *v.* Phillipps, 1 Pick. 203; Alexander *v.* Hutcheson, 2 Hawkes, 535; Robbins *v.* Eaton, 10 N. H. 561; Ordinary *v.* Wherry, 1 Bailey, 28; Benham *v.* Bishop, 9 Conn. 330.

[1] See Hale *v.* Gerrish, *supra;* Bigelow *v.* Grannis, 2 Hill, 120; Willard *v.* Hewlett, 19 Wend. 301. In Rogers *v.* Hurd, 4 Day, 57, it was held, that the same evidence ought to be required of the confirmation, after full age, of a voidable contract made by an infant, as of the execution of a new one. In Whitney *v.* Dutch, 14 Mass. 460, *Parker*, C. J., said: "No particular words seem necessary to a ratification, and provided they import a recognition and confirmation of his promise, they need not be a direct promise to pay." Again, in Tibbets *v.* Gerrish, 5 Fost. 41, it was *held*, that to sustain the issue of a new promise upon a plea of infancy, a more stringent rule prevails than where the defence is the statute of limitations; that there must be either an express ratification by a new promise made, or such acts of the individual, after becoming of age, as to amount to an unequivocal ratification and promise. And see Edgerly *v.* Shaw, 5 Fost. 514; Martin *v.* Mayo, 10 Mass. 137; Orvis *v.* Kimball, 3 N. H. 314; Goodsell *v.* Myers, 3 Wend. 479; Benham *v.* Bishop, 9 Conn. 330; Ford *v.* Phillipps, 1 Pick. 202; Wilcox *v.* Roath, 12 Conn. 550; Hinely *v.* Margaritz, 3 Barr, 428; Smith *v.* Mayo, 9 Mass. 62; Merchants' Fire Ins. Co. *v.* Grant, 2 Edwards, 544. — The ratification must be made before the commencement of the suit. Goodridge *v.* Ross, 6 Met. 487; Merriam *v.* Wilkins, 6 N. H. 432; Thing *v.* Libbey, 16 Maine, 55. And it must be made to the party himself or his agent. See Hoit *v.* Underhill, 9 N. H. 436; Bigelow *v.* Grannis, 2 Hill, 120; Goodsell *v.* Myers, 3 Wend. 479.

[2] Harmer *v.* Killing, 5 Esp. 102; Ford *v.* Phillipps, 1 Pick. 202; Smith *v.* Mayo, 9 Mass. 64; Curtin *v.* Patton, 11 S. & R. 307; Brooke *v.* Gally, 2 Atk. 34; Hinley *v.* Margaritz, 3 Barr, 428.

[3] In Cole *v.* Cole, 3 Esp. 159, the plaintiff to a plea of infancy replied a new promise after full age, and the evidence was of a promise to pay "when the party was able;" and it was *held* that the plaintiff must prove that the defendant was of ability to pay. And see Everson *v.* Carpenter, 17 Wend. 419; Thompson *v.* Lay, 4 Pick. 48; Davis *v.* Smith, 4 Esp. 36; Bosford *v.* Saunders, 2 H. Bl. 116. But the plaintiff is not

If an infant's contract is not avoided, it remains in force. But the difficult question sometimes occurs, what confirmation by mere silence, after a person arrives at full age, prevents him from avoiding his contract made during his infancy. As a general rule, mere silence, or the absence of disaffirmance, is not a confirmation; because it is time to disaffirm the contract when its enforcement is sought.[1]

But if an infant buys property, any unequivocal act of ownership after majority, — as selling it, for example — is a confirmation.[2] And generally, a silent continued possession and use of the thing obtained by the contract, is evidence of a confirmation;[3] and it is much stronger if there be a refusal to redeliver the thing when it can be redelivered;[4] and is perhaps conclusive, when the conduct of the party may be construed as a confirmation, and if not so construed must be regarded as fraudulent.[5]

The great exception to the rule, that an infant's contracts are voidable, is when the promise or contract is for necessaries. The rule itself is for the benefit and protection of the infant; and the same reason causes the exception; for it cannot be for the benefit of the infant that he should be unable to purchase food, raiment, and shelter, on a credit, if he has no funds. The same reason, however, enlarges this exception, until it covers not only strict necessaries, or those without which the infant might

bound to show an ability to pay without *inconvenience*. Martin *v.* Mayo, 10 Mass. 141; Thompson *v.* Lay, *supra*.

[1] Thing *v.* Libbey, 16 Maine, 55; Smith *v.* Kelly, 13 Met. 309; Dana *v.* Stearns, 3 Cush. 372. See also editor's note to Dublin *v.* Wicklow R. R. Co. 16 E. L. & E. 556. But see Thomasson *v.* Boyd, 13 Alab. 419; Delano *v.* Blake, 11 Wend. 85.

[2] See Cheshire *v.* Barrett, 4 McCord, 241, where an infant gave his note for a horse, payable to A or bearer, and kept the horse after he became of age, and then sold him; and it was held a confirmation, and that the bearer of the note, to whom it had been transferred, might recover on it. And see Deason *v.* Boyd, 1 Dana, 45; Lawson *v.* Lovejoy, 8 Greenl. 405.

[3] Thus, in Boyden *v.* Boyden, 9 Met. 519, it was *held*, that if an infant buys goods on credit, and retains them in his own hands, and uses them for his own purposes, for an unreasonable time after he comes of age, without restoring them to the seller, or giving him notice of an intention to avoid the contract, it operates as a ratification of the contract, and renders the buyer liable in an action for the price of the goods. See also Eubanks *v.* Peak, 2 Bailey, 497; Alexander *v.* Heriot, 1 Bailey's Equity, 223.

[4] See Aldrich *v.* Grimes, 10 N. H. 194, where an infant purchased a potash kettle, and gave his promissory note for the price, it being agreed by the parties that he might try the kettle, and return it if it did not suit him. The vendor, after the infant became of age, requested him to return the kettle if he did not intend to keep it; but he retained and used it a month or two afterwards. *Held*, that this was a sufficient ratification of the contract, and that an action might be sustained on the note.

[5] See Delano *v.* Blake, 11 Wend. 85.

perish, or would certainly be uncomfortable, but all those things which are distinctly appropriate to his person, station, and means.[1]

There is no exact dividing line which could make this definition precise. But it is settled that mercantile contracts, as of partnership,[2] purchase and sale of merchandise,[3] signing notes and bills,[4] are not necessaries, and that all such contracts are voidable by the infant. So, if he gives his note even for necessaries, he is not bound by it; but may defend against it on the ground that it was for more than their true value, and the jury will be instructed to give against him only a verdict for so much as the necessaries were worth.[5]

If he borrows money, to expend in the purchase of necessaries, and gives his note, the debt, or the note, has been held, at law, voidable by the infant.[6] But courts of equity would give relief,[7] and even at law an infant is liable for money paid at his request for necessaries for him;[8] and if he give a note for necessaries with a surety who pays it, the surety may recover against the infant.[9]

[1] In Co. Litt. 172, a, it is said: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." A good common school education is a "necessary;" but it seems that a collegiate education is not; at least for all persons. Middlebury College *v.* Chandler, 16 Vt. 683; Raymond *v.* Loyl, 10 Barb. Sup. C. 489; Peters *v.* Fleming, 6 M. & W. 48. As to what are necessaries for an infant generally, see Bradley *v.* Pratt, 23 Vt. 378; Harrison *v.* Fane, 1 M. & Gr. 530; Johnson *v.* Lines, 6 W. & S. 80; Hands *v.* Slaney, 8 T. R. 578; Phelps *v.* Worcester, 11 N. H. 51; Tupper *v.* Cadwell, 12 Met. 559. And an infant is liable for necessaries for his wife and children. Chapple *v.* Cooper, 11 M. & W. 252; Beeler *v.* Young, 1 Bibb, 152; Abell *v.* Warren, 4 Vt. 149.

[2] See Crabtree *v.* May, 1 B. Mon. 289; Goode *v.* Harrison, 5 B. & Ald. 147.

[3] Whittingham *v.* Hill, Cro. Jac. 494; Whywall *v.* Champion, 2 Stra. 1083; Dilk *v.* Keighley, 2 Esp. 480; Latt *v.* Booth, 3 Carr. & Kir. 292. But where an infant, with his guardian's consent, carried on certain business, it was *held* that he might bind himself to pay for articles suitable and necessary for that business. Rundell *v.* Keeler, 7 Watts, 237. But we should have some doubt of this.

[4] See Ford *v.* Phillipps, 1 Pick. 202.

[5] It was formerly held that no action could be maintained against an infant upon a promissory note, although given for necessaries. See Mine *v.* Richmonds, 6 Yerger, 9; McCrillis *v.* How, 3 N. H. 348; Bouchelle *v.* Clary, 3 Brevard, 194; Swasey *v.* Vanderheyden, 10 Johns. 33; Fenton *v.* White, 1 Southard, 100; Hawks *v.* Deal, 3 McCord, 257. But the later cases founded upon the better reasons uphold the rule stated in the text. See Bradly *v.* Pratt. 23 Vt. 378; Stone *v.* Dennison, 13 Pick. 1; Earl *v.* Reed, 10 Met. 387; Dubose *v.* Whedon, 4 McCord, 221.

[6] See Bent *v.* Manning, 10 Vt. 225; Beeler *v.* Young, 1 Bibb, 519; Hickman *v.* Hall, 5 Littell, 338; Walker *v.* Simpson, 7 W. & S. 83.

[7] See Marlow *v.* Pitfield, 1 P. W. 559, 1 Vesey, 249.

[8] Randall *v.* Sweet, 1 Denio, 460; Clark *v.* Leslie, 5 Esp. 28. In Bent *v.* Manning, *supra*, the court considered it questionable whether courts of law might not now consider money to a certain extent necessary to be furnished a minor under some circumstances.

[9] See Conn *v.* Coburn, 7 N. H. 368; Haine *v.* Terrant, 2 Hill, S. C. 400.

If an infant avoid a contract, he can take no benefit from it; thus, if he contracts to sell, and refuses to deliver, he cannot demand the price; or if he contracts to buy, and refuses the price, he cannot demand the thing sold.[1]

If he fraudulently represented himself as of age, when he was not, and so made a contract which he afterwards sought to avoid, this fraud will not prevent his avoiding the contract;[2] but for the fraud itself he is answerable as an adult would be.[3] So if he disaffirms a sale, for which he has received the money, he must return the money; because keeping it would in fact be a confirmation of the sale.[4] So if after his majority he destroys or puts out of his hands a thing bought while an infant, he cannot now demand his money back, as he might have done on tendering the thing bought; for by his disposal of it he has acted as owner, and confirmed the sale.[5]

In general, if an infant avoids a contract on which he has advanced money, and it appears that he has received from the other party an adequate consideration for the money so advanced, which he cannot or will not restore, he cannot recover the money back. But if an infant has engaged to labor for a certain period, and, after some part of the work is performed, rescinds the contract, he can recover on a *quantum meruit* for the work he has done.[6]

The contract of an infant is voidable only by him, or by his

[1] See Harney *v.* Owen, 4 Blackf. 337. Thus, in Ottman *v.* Moak, 3 Sandf. Ch. 431, where an infant purchased goods, and mortgaged them to secure the purchase-money, it was *held* that he might, after arriving at maturity, affirm both the purchase and the mortgage, or disaffirm both, but he could not disaffirm the mortgage and keep the goods. And see Badger *v.* Phinney, 15 Mass. 359; Taft *v.* Pike, 14 Vt. 405; Farr *v.* Sumner, 12 Vt. 28; Hubbard *v.* Cummings, 1 Greenl. 13; Strain *v.* Wright, 7 Geo. 568.

[2] Burley *v.* Russell, 10 N. H. 184. See also Stoolfoos *v.* Jenkins, 12 S. & R. 399; Conroe *v.* Birdsall, 1 Johns. Cases, 127. But see Jennings *v.* Whitaker, 4 Monroe, 51.

[3] Com. Dig. Action on the case for Deceit, A, 10; 2 Kent's Comm. 241; Fitts *v.* Hall, 9 N. H. 441. But see Brown *v.* McClune, 5 Sandf. 224; Price *v.* Hewitt, 18 E. L. & E. 522.

[4] Bailey *v.* Barnberger, 11 B. Monroe, 113; Badger *v.* Phinney, 15 Mass. 363; Hubbard *v.* Cummings, 1 Greenl. 13; Smith *v.* Evans, 5 Humph. 70; Taft *v.* Pike, 14 Verm. 405; Carr *v.* Clough, 6 Fost. 280; Bartholomew *v.* Finnemore, 17 Barb. 428. And he who seeks the aid of a court of equity to avoid his conveyance, on the ground of infancy, must refund the consideration-money received by him. Smith *v.* Evans, 5 Humph. 70; Hielger *v.* Bennett, 3 Edw. Ch. 222.

[5] See Hubbard *v.* Cummings, 1 Greenl. 13; Badger *v.* Phinney, 15 Mass. 363; Farr *v.* Sumner, 12 Vt. 28; Taft *v.* Pike, 14 Vt. 405; Lawson *v.* Lovejoy, 8 Greenl. 405.

[6] See Holmes *v.* Blogg, 8 Taunton, 508; Corpe *v.* Overton, 10 Bing. 252; McCoy *v.* Huffman, 8 Cow. 84; Medbury *v.* Watrous, 7 Hill, 110; Vent *v.* Osgood, 19 Pick. 572; Breed *v.* Judd, 1 Gray, 455. And see also, Moses *v.* Stevens, 2 Pick. 332; Thomas *v.* Dike, 11 Vt. 273; Hoxie *v.* Lincoln, 25 Vt. 206; Lufkin *v.* Mayall, 5 Fost. 82.

legal representatives, and not by the other party.[1] The election to avoid or confirm belongs to the infant alone; and his having this right does not affect the obligation of the other party.[2] Therefore, one who gives a note to an infant, or makes any other mercantile contract with him, must abide by it, although the infant may, if he choose, annul it.[3]

But if the note were given or the contract made by a fraud on the part of the infant, the injured party has the same right of defending against it on this ground as if the fraudulent party were not an infant. And, for this purpose, a wilfully false representation of the infant that he has reached his majority, would be a sufficient fraud to enable the party dealing with him to set the contract aside.[4]

SECTION III.

OF MARRIED WOMEN.

By the common law of England and of this country, a married woman is wholly incapable of entering into mercantile con-

[1] Gullett *v.* Lamberton, 1 Eng. [Ark.] 109; Parker *v.* Baker, 1 Clark's Ch. 136; Rose *v.* Daniel, 3 Brev. 438; Voorhees *v.* Wait, 3 Green, 343; Jackson *v.* Mayo, 11 Mass. 147; Hussey *v.* Jewett, 9 Mass. 100; Marten *v.* Mayo, 10 Mass. 137.

[2] See McGinn *v.* Shaeffer, 7 Watts, 412; Boyden *v.* Boyden, 9 Met. 519; Hunt *v.* Peake, 5 Cow. 475; Pool *v.* Pratt, 1 D. Chip. 252; Willard *v.* Stone, 7 Cow. 22; Holt *v.* Ward Clarenieux, 2 Strange, 937. And see Cannon *v.* Alsbury, 1 A. K. Marsh. 76.

[3] Thus, in Warwick *v.* Bruce, 2 M. & S. 205, where the defendant agreed to sell to the plaintiff (an infant) all the potatoes then growing on three acres, at so much per acre, to be dug up and carried away by the plaintiff, and the plaintiff paid £40 to the defendant under the agreement, and dug a part, and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue, it was *held*, that he was entitled to recover for this breach of the agreement. And Lord *Ellenborough* said: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid £40, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would have been correct, but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do. It is certainly for the benefit of infants, where they have given the fair value for any article of produce, that they should have the thing contracted for. And it is not necessary that they should wait until they come of age in order to bring the action. A hundred actions have been brought by infants for breaches of promise of marriage, and I am not aware that this objection has ever been taken since the case in Strange."

[4] Walker *v.* Davis, 1 Gray, 506. And see Humphry *v.* Douglass, 10 Vt. 71; Lewis *v.* Littlefield, 15 Maine, 233; Bullock *v.* Babcock, 3 Wend. 391.

tracts on her own account. By the fact of marriage, her husband becomes possessed of all her real estate during her life, and if a living child be born of the marriage, he has her real estate during his own life, if he survive her.[1]

All the personal property which she has in actual possession becomes absolutely his, as entirely as if she had made a transfer of it to him. But by property in possession the law means only her goods and chattels; or things which can be handled; and which actually are in her hands, or under her direct and immediate control. If she have notes of hand, money due her, or shares in various stocks, these are not considered as things in possession, but as things in action, or, as the old Norman word is still used, *choses in action.* The law as to these is different. The husband may, if he pleases, reduce them to his possession, and so make them absolutely his own. It is sometimes difficult to decide whether the husband has reduced them to possession. In general, he does this by any act which is distinctly an act of ownership; as if he demands and collects the debts due to her,[2] or indorses her notes — which he can do in his own name — and sells them,[3] or has the stock transferred to his own name,[4] or, in general, makes any final and effectual disposition of these *choses in action.*[5]

If, however, he does not reduce them to possession, and dies, and she survives him, her whole right and property revive at his death, without any interest whatever in his representatives.[6] And even if he disposes of them by will, this is ineffectual, unless he had reduced them into his possession while he lived.[7]

If, however, he survives her, he will be made, if he wishes it,

[1] Co. Litt. 351, a; 2 Bl. Com. 126; 4 Kent's Com. 26; Paine's case, 8 Rep. 34; Mercer *v.* Selden, 1 How. 37.

[2] See Bates *v.* Dandy, 2 Atk. 206; Earl of Salisbury *v.* Newton, 1 Eden, 370; Johnson *v.* Johnson, 1 Jac. & W. 456.

[3] Mason *v.* Morgan, 2 A. & E. 30; Scarpellini *v.* Atchison, 7 Q. B. 864. But in Latourette *v.* Williams, 1 Barb. 9, it was *held*, that the pledge of a note of the wife by the husband, which he afterwards redeemed, was not such a reduction into possession as destroyed the interest of the wife.

[4] Burnham *v.* Bennett, 2 Coll. C. C. 254.

[5] See, in addition to the cases already cited, Garforth *v.* Bradley, 2 Ves. 675; Carteret *v.* Paschal, 3 P. Wms. 197; Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Hart *v.* Stephen, 6 Q. B. 937; Timbers *v.* Katz, 6 W. & S. 290.

[6] Hayward *v.* Hayward, 20 Pick. 517; Co. Litt. 351, b; Estate of Kintzenger, 2 Ashmead, 455; Stephens *v.* Beal, 4 Georgia, 319; Killcrease *v.* Killcrease, 7 How. [Miss.] 311; Rogers *v.* Bumpass, 4 Ired. Eq. 585. And so if the parties are divorced *a vinculo.* Legg *v.* Legg, 8 Mass. 99.

[7] See Blunt *v.* Bestland, 5 Ves. 515.

her administrator, and then can collect all her *choses in action*, and hold them or their proceeds as his own.[1] And if she dies, and then he dies before he has collected these *choses in action*, administration on his wife's effects will be granted to *his* next of kin, and not to *hers;* and when collected they will belong to his estate.[2]

On the other hand, the husband is liable, with her, for all the debts for which his wife was liable when he married her.[3] This is true whether they were then payable, or did not mature until after the marriage; and whether he received any thing with her or not.[4] If he dies before they are paid, his estate is not liable, even if he had a fortune with her, and that fortune goes to his heirs or his creditors, and her creditors get nothing. So it is if the wife dies before the creditor recovers a judgment against the husband, and he then retains all her fortune.[5] But her responsibility revives at his death, and she is liable as before marriage, even if she carried him a fortune, and all her fortune went, as above stated, to his representatives.[6] But if she dies, leaving *choses in action* not reduced by the husband to possession, and he reduces them to his possession as her administrator, he must apply them to the payment of her debts, and can hold to himself only what is left after such payment.[7]

Such, we have said, is the common law of England and of this country. But in several of our States it is essentially modified by statutory provisions. These we do not speak of in any detail, as they not only vary very much in different States, but are fluctuating and changing rapidly, in most of the States which

[1] 1 Roll. Abr. 910; Garforth *v.* Bradly, 2 Vesey, 676; Elliot *v.* Collier, 3 Atk. 526, 1 Vesey, 15; per Lord *Tenterden*, in Richards *v.* Richards, 2 B. & Ad. 447. And see Drew *v.* Long, 21 E. L. & E. 339.

[2] See Fielder *v.* Hanger, 3 Hagg. Eccl. Rep. 770; 2 Kent's Com. 118.

[3] See 1 Bl. Com. 444; 2 Kent's Com. 128; Morris *v.* Norfolk, 1 Taunt. 212; Howes *v.* Bigelow, 13 Mass. 384; Pitkin *v.* Thompson, 13 Pick. 64; Haines *v.* Corliss, 4 Mass. 659. See also Dodgson *v.* Bell, 3 E. L. & E. 542. And although he was an infant at the time. Butler *v.* Breck, 7 Met. 164; Roach *v.* Quick, 9 Wend. 238.

[4] See Heard *v.* Stamford, Cases Temp. Talbot, 173, 3 P. Wms. 409; Thomond *v.* Earl of Suffolk, 1 P. Wms. 469.

[5] See Rol. Abr. 351. In Heard *v.* Stamford, 3 P. Wms. 400, Lord Chancellor *Talbot* said: "It is extremely clear, that by law the husband is liable to the wife's debts only during coverture, unless the creditor recovers judgment against him in the wife's lifetime." And see Witherspoon *v.* Dubose, 1 Bailey, Eq. 166; Howes *v.* Bigelow, 13 Mass. 384; Chaplin *v.* Moore, 7 Monroe, 179; Buckner *v.* Smith, 4 Des. 371; Nutz *v.* Retter, 1 Watts, 229.

[6] Woodman *v.* Chapman, 1 Camp. 189.

[7] Heard *v.* Stamford, 3 P. Wms. 409.

deal with them at all. It is in truth a very difficult question, how far it is well to abrogate the old law, which was of feudal origin, and so far inappropriate to our own state of society. After sufficient experiment, we shall know better than we know now how to pay a due regard to the property and the rights of the wife, and yet preserve the marriage relation from the mischiefs and degradation which must ensue if husband and wife are no longer one person in any sense, but may bargain together, and buy, and sell, and own, and pay, with, or from, or to each other, precisely like other persons.

It should be added, that the wife may be the agent of the husband, and transact for him his mercantile concerns, making, accepting, or indorsing bills or notes, purchasing goods, rendering bills, collecting money and receipting for it, and in general entering into any contract so as to bind him, if she has his authority to do so.[1] Further, if she is in the habit of thus acting for him, and he knows it, and does not object, and still more if he by his own acts sanctions hers, it will be deemed that he has given her authority to act for him.[2]

So if a woman carries on trade personally, and to all appearance as a sole trader, and her husband knows this, and makes no objection, especially if he resides with her, and still more if he is benefited by the trade, or takes the profit in any way, it will be understood — in the absence of sufficient testimony to the contrary — that she is acting as his agent, and he will be liable on her trade contracts, although made in her own name.[3]

In this country there seems to be a disposition, both in the legislatures and in the courts, to hold that a woman who is deserted by her husband, and who is laboring successfully to maintain herself, and perhaps her children, as a trader, is in substance

[1] Prestwick *v.* Marshall, 7 Bing. 565. And see Barlow *v.* Bishop, 1 East, 432; Colis *v.* Davis, 1 Camp. 485; Minard *v.* Mead, 7 Wend. 68; Sinders *v.* Bradwell, 5 C. B. 583.

[2] Clifford *v.* Burton, 1 Bing. 199; Felker *v.* Emerson, 16 Vt. 653; Smallpiece *v.* Dawes, 7 C. & P. 40.

[3] Thus, in Petty *v.* Anderson, 2 C. & P. 38, it was *held*, that if husband and wife are living together, and business is carried on in the house in which they live, though the wife's name only appears in the purchase of goods, in the parish rates, and in a contract with the parish officers, yet the husband partaking of the profits of the trade, and being aware of and assenting to the dealings, is liable in an action for goods delivered at their house for the purpose of this trade, though the bills of parcels are headed in the wife's name. And see Huckman *v.* Fernie, 3 M. & W. 505; Plimmer *v.* Sells, 3 N. & Mann. 422.

a sole trader, liable on her own contracts, and entitled to her own earnings. If this were held, it would seem to follow, of course, that her husband should not be liable for the debts she contracts. But so great a change as this can hardly be introduced by adjudication alone, in the absence of distinct statutory provisions.

CHAPTER II.

OF AGREEMENT AND ASSENT.

SECTION I.

OF THE LEGAL MEANING OF AGREEMENT.

No contract which the law will recognize and enforce exists, until the parties to it have agreed upon the same thing, in the same sense.[1]

There is an apparent exception to this rule, when, for example, A declares that he was not understood by B, or did not understand B, in a certain transaction, and that there is therefore no bargain between them; and B replies by showing that the language used on both sides was explicit and unequivocal, and constituted a distinct contract. Here, B would prevail. The reason is, that the law presumes that every person means that which he distinctly says. If A had offered to sell B his horse for twenty dollars, and received the money, and then tendered to B his cow, on the ground that he was thinking only of his cow, and used the word horse by mistake, this would not avoid his obligation, unless he could show that the mistake was known to B; and then the bargain would be fraudulent on B's part. This would be an extreme case; but difficult questions of this sort often arise. If A had agreed to sell, and had actually delivered, a cargo of shingles at "$3.25," supposing that he was to receive that price for a "bunch," which contains five hundred, and B

[1] In Hutchinson *v.* Bowker, 5 M. & W. 535, which was *assumpsit* for non-delivery of barley, defendants by letter offered to the plaintiffs a certain quantity of "good" barley, at a certain price. Plaintiffs replied: "We accept your offer, expecting you will give us fine barley and full weight." The jury found that there was a distinction in the trade between the words "good" and "fine," and the court held that there was not a sufficient acceptance. So in Bruce *v.* Pearson, 3 Johns. 534, where a person sent an order to a merchant for a particular quantity of goods on certain terms of credit, and the merchant sent a less quantity of goods, at a shorter credit, and the goods were lost by the way, it was *held* that the merchant must bear the loss; for there was no contract, express or implied, between the parties. See further, Hazard *v.* New England Marine Ins. Co. 1 Sumner, 218; Greene *v.* Bateman, 2 W. & M. 359; Tuttle *v.* Love, 7 Johns. 470; Eliason *v.* Henshaw, 4 Wheat. 225; Falls *v.* Gaither, 9 Porter, 605; Hamilton *v.* Terry, 10 E. L. & E. 473.

supposed he had bought them at that price for a "thousand," which view should prevail? The answer would be, first, that if there was, honestly and actually, a mutual mistake, there was no contract, and the shingles should be returned. But, secondly, if a jury should be satisfied, from the words used, the usage prevailing where the bargain was made and known to the parties, or other circumstances attending the bargain, that B knew that A was expecting that price for a bunch, B would have to pay it; and if they were satisfied that A knew that B supposed himself to be buying the shingles by the thousand, then A could not reclaim the shingles, nor recover more than that price.[1]

In construing a contract, the actual and honest intention of the parties is always regarded as an important guide.[2] But it must be their intention as expressed in the contract.[3] If the terms of the contract be wholly unambiguous, there is no need of, and no room for, construction.[4]

If the parties, or either of them, show that a bargain was honestly but mistakenly made, which was materially different from that intended to be made, it may be a good ground for declaring that there was no contract. But it would not be a good ground

[1] Greene *v.* Bateman, 2 W. & M. 359. And see Hazard *v.* New England Marine Ins. Co. 1 Sumner, 218; Ketchum *v.* Catlin, 21 Vt. 191; Winsor *v.* Dillaway, 4 Met. 221. This last case was *indebitatus assumpsit* to recover commission on the sale of a ship. Both parties offered evidence, one to prove, and the other to disprove, that it is the usage of ship-brokers in Boston, whenever they bring together a ship-owner and a purchaser, and the owner sells the ship to such purchaser, to charge the usual commission; and the jury were instructed that if such usage was proved to exist, and the defendants knew that such usage existed, it raised an implied promise to pay the commission. And this instruction was held to be correct. See also Rogers *v.* Mechanics Ins. Co. 1 Story, 603; The Schooner Reeside, 2 Sumner, 567; The Taunton Copper Co. *v.* Merchants' Ins. Co. 22 Pick. 115.

[2] Thus, in Parkhurst *v.* Smith, Willes, 332, *Willes*, C. J., said: "Whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought if possible to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it." And see Hunter *v.* Miller, 6 B. Monroe, 619; Morey *v.* Homan, 10 Vt. 565; Gray *v.* Clark, 11 Vt. 583; Ford *v.* Beck, 11 Q. B. 866.

[3] In Parkhurst *v.* Smith, *supra*, *Willes*, C. J., further said: "I admit that though the intention of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them." And see Gibson *v.* Minet, 1 H. Bl. 569, 614, per *Eyre*, C. B.

[4] Benjamin *v.* McConnell, 4 Gilm. 536; Strohecker *v.* The Farmers' Bank, 6 Barr, 41.

for substituting the contract they had not made, but intended to, for that which they had made and had not intended to make.

On this subject there is another rule of frequent application; namely, that when any written instrument does not express the real intention of the parties in consequence of some mistake in the language used, as by the use of one word when the parties intended another, such instrument will be corrected by a court of equity, and made to conform to what the parties intended.[1]

But only mistakes of fact can be corrected; no man being permitted to take advantage of a mistake of the law, either to enforce a right, or avoid an obligation; for it would be obviously dangerous and unwise to encourage ignorance of the law, by permitting a party to profit, or to escape, by his ignorance.[2] But the law which one is required at his peril to know, is the law of his own country. Ignorance of the law of a foreign state is ignorance of fact. In this respect the several States of the Union are foreign to each other. Hence, money paid through ignorance or mistake of the law of another State may be recovered back.[3]

Fraud annuls all obligation and all contracts into which it enters, and the law relieves the party defrauded. But if both of the parties are fraudulent, neither can take advantage of the fraud of the other.[4]

[1] Beaumout *v.* Bramley, Tyr. & Russ. 41; Rogers *v.* Earl, 1 Dick. 294; Simmons *v.* North, 3 S. & M. 67; Tilton *v.* Tilton, 9 N. H. 385; Craig *v.* Kittredge, 3 Fost. 231.

[2] Storrs *v.* Barker, 6 Johns. Ch. 166; Shatwell *v.* Murray, 1 Johns. Ch. 512; Campbell *v.* Carter, 14 Ill. 286; Hall *v.* Reed, 2 Barb. Ch. 501; Dupre *v.* Thompson, 4 Barb. 279.

[3] Haven *v.* Foster, 9 Pick. 112; Norton *v.* Marden, 3 Shepley, 45.

[4] In Hoitt *v.* Holcomb, 3 Fost. 554, *Bell*, J., said: "Fraud vitiates every thing, contracts, obligations, deeds of conveyance, and even the records and judgments of courts." And see Wilson *v.* Green, 25 Vt. 450; Munn *v.* Worrall, 16 Barb. 221; Spindles *v.* Atkinson, 3 Md. 409; Ford *v.* Aikin, 4 Rich. 121; Harris *v.* Ranson, 24 Miss. 504. But no party can avail himself of his own fraud, either in maintaining or defending a suit. Jones *v.* Yates, 9 B. & C. 532; Taylor *v.* Weld, 5 Mass. 116; Ayers *v.* Hewett, 9 Maine, 281; Hollis *v.* Morris, 2 Harring. 128. And one who gives a fraudulent bill of sale to defraud his creditors cannot set it aside. Bessey *v.* Windham, 6 Q. B. 166; Nichols *v.* Patten, 18 Maine, 231. For the law where both parties are fraudulent, see Gondy *v.* Gebhart, 1 Ohio St. 262; Warburton *v.* Aker, 1 McLean, 460; Nellis *v.* Clark, 20 Wend. 24; Smith *v.* Hubbs, 1 Farf. 71.

SECTION II.

WHAT IS AN ASSENT.

The most important application of the rule stated at the beginning of this chapter, is the requirement that an acceptance of a proposition must be a simple and direct affirmative, in order to constitute a contract. For if the party receiving the proposition or offer, accepts it on any condition, or with any change of its terms or provisions which is not altogether immaterial, it is no contract until the party making the offer consents to these modifications.[1]

Therefore, if a party offers to buy certain goods at a certain price, and directs that the goods shall be sent to him, and the owner accepts the offer and sends the goods as directed, and they are lost on the way, it is the buyer's loss, because the goods were his by the sale, which was completed when the offer was accepted. But if the owner accepts the offer with any material modification of its terms, and then sends the goods and they are lost, it is his loss now, because the contract of sale was not completed.[2]

Nor will a voluntary compliance with the conditions and terms of a proposed contract make it a contract obligatory on the other party, unless there have been an accession to, or an acceptance of, the proposition itself.[3] But there may be cases in which an offer may come from a distance, and be such in its purpose and terms,

[1] See Hutchinson *v.* Bowker, 5 M. & W. 535, cited *ante*, p. 14; Slaymaker *v.* Irwin, 4 Whart. 369. See also Suydam *v.* Clark, 2 Sandf. 133, where, on a sale of one thousand barrels of flour, the broker stated in the bought note that seven hundred and fifty barrels were to be delivered when it arrived, not later than three days; and in the sold note, that the whole was to be delivered. *Held*, that this was a material variance in the notes of sale, and that no contract was effected. See also Peltier *v.* Collins, 3 Wend. 459; Sivewright *v.* Archibald, 6 E. L. & E. 286; Jordan *v.* Norton, 4 M. & W. 155.

[2] See Bruce *v.* Pearson, 3 Johns. 534, cited *ante*, p. 14, and other cases there cited.

[3] In Johnston *v.* Fessler, 7 Watts, 48, the defendant offered to pay the debts of third persons, if the plaintiffs would forbear to sue them, either by giving the plaintiffs iron immediately, or money in the following spring, to which the plaintiffs did not assent, but afterwards complied with the terms proposed; and it was *held* that this did not render the defendant liable. And see Bockwith *v.* Cheever, 1 Fost. 41. So, where a guaranty is offered, it will be seen in our chapter on Guaranty, that the general rule requires that the party receiving it shall expressly accept it before he acts on the faith of it. See McIver *v.* Richardson, 1 M. & S. 557; Mozley *v.* Tinker, 1 Cr. M. & R. 692.

that an immediate compliance with it may be the only or at least the ready and proper way of signifying acceptance and assent.[1]

SECTION III.

OF OFFERS GIVING TIME.

It sometimes happens that one party makes another a certain offer and gives him a certain time in which he may accept it. The law on this subject was once somewhat uncertain, but may now be considered as settled. It is this. If A makes an offer to B, which B at once accepts, there is a bargain. If B declines or neglects to accept it at once, but takes time to consider, and then accepts, A may say he has changed his mind and does not make that offer. If A when he makes the offer, says to B that he may have any certain time wherein to accept it, and is paid by B for thus giving him time, he cannot withdraw the offer, or rather, if he withdraws it, for this breach of his contract, the other party, B, may have his action for damages; and an acceptance by B within the time is obligatory upon A. If A is not paid for giving the time, A may then withdraw the offer at once or whenever he pleases, provided B has not previously accepted it. But if B has accepted the offer before the time expired, and before the offer was withdrawn, then A is bound although he gave the time voluntarily and without consideration. For his offer is to be regarded as a continuing offer during all the time given, unless it be withdrawn.[2]

[1] See Train *v.* Gould, 5 Pick. 380.

[2] In Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224, it was held that a proposition in writing to sell land, at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract, the specific performance of which may be enforced in equity. *Fletcher*, J., said: "In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force, and unrevoked, it was a continuing offer, during the time limited for acceptance; and during the whole of that time it was an offer every instant, but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes

SECTION IV.

OF A BARGAIN BY CORRESPONDENCE.

When a contract is made by correspondence the question occurs, at what time, or by what act is the contract completed. The cases on this subject have fluctuated very much; but the law may now be considered as conclusively settled both in England and in this country. If A writes to B proposing to him a contract, this is a continued proposition or offer of A until it reaches B, and for such time afterwards as would give him a reasonable opportunity of accepting it.[1] But it may be withdrawn by A at any time before acceptance. It is not however withdrawn, in law, until a notice of withdrawal reaches B.[2]

and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted and the bargain completed at once." In Wright *v.* Brigg, 21 Eng. L. & Eq. 591, an agent was authorized by the defendant to make a proposal of sale of some land to the plaintiff, to be accepted within a week. The plaintiff wrote to the agent within that time, accepting the offer, but the agent did not communicate the acceptance to the defendant until long after. *Held*, that there was a valid contract, which was not destroyed by the neglect of the agent to communicate the acceptance to the defendant. In Payne *v.* Cave, 3 T. R. 148, it was held that at a sale by auction, every bid is an offer which may be withdrawn at any time before it is accepted by the fall of the hammer or otherwise.

[1] This doctrine was first laid down in England in Adams *v.* Lindsell, 1 B. & Ald. 681. In that case the defendants by letter offered to sell to the plaintiffs a certain quantity of wool, on certain specified terms. This letter reached the plaintiffs on the 5th of September at 7 P. M. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. This letter reached the defendants in due course of mail, on the 9th of September; but they had sold the wool in question on the day preceding to another person. The action was brought to recover damages of the defendants for not delivering the wool to the plaintiffs. The court held that the contract was complete from the moment the offer was accepted, and therefore the plaintiffs were entitled to recover. It was contended for the defendants, that there could be no binding contract between the parties, until the plaintiffs' answer was actually received. But the court said, "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter." And see Averill *v.* Hedge, 12 Conn. 436; Moctier *v.* Frith, 6 Wend. 103; Brisban *v.* Boyd, 4 Paige, 17; Stocken *v.* Collen, 7 M. & W. 515; Dunlop *v.* Higgins, 1 House of Lords Cases, 381.

[2] Routledge *v.* Grant, 4 Bing. 653. In the case of The Palo Alto; Daveis, R. 344, *Ware*, J., says, "In all engagements *inter absentes*, when the negotiations are carried on by letters or messengers, an offer by one party, until it is made

This is the important point. Thus if A, in Boston, writes to B, in New Orleans, offering him a certain price for one hundred bales of cotton; and the next day alters his mind and writes to B, withdrawing his offer; if the first letter reaches B *after* the second is written, but *before* the second reaches him, B has a right to accept the offer, and by his acceptance bind A. But if B delays his acceptance until the second letter reaches him, the offer is then effectually withdrawn. It is a sufficient acceptance if B writes to A declaring his acceptance, and puts his letter into the post-office. It seems now quite clear that as soon as the letter leaves the post-office, or is beyond the reach of the writer, the acceptance is complete.[1]

The cases above cited would indicate, that if the letter of withdrawal reaches B after he has put his letter of acceptance into the post-office, but before it has gone, and while he could still take it back if he chose, he may disregard the withdrawal of the offer, and let his letter go on its way. This certainly is not

known to the other, is but an intention not expressed, *propositum in mente retentum*. If the messenger or letter can be overtaken before it arrives at its destination, it may be revoked; but if the revocation does not arrive until after the offer is received and *accepted*, and especially not until it has been acted upon, then it is too late. For the revocation is but a simple act of the will, a *propositum*, not *res gesta*, an act done, until after it is known, and of course can have no more effect than an intention not expressed, but confined within the breast of the party. It is a remark of one of the most profound jurists of the last age that an act of the will not known is, in jurisprudence, as if it did not exist. Une volonté qui n'est pas comme est en jurisprudence comme ei elle n'existit pas. C. Toul. Droit Civil, No. 29." So also, in Tayloe *v.* Merchants' Fire Ins. Co. 9 How. 390, 400, where the question arose upon a letter from the defendants to the plaintiffs, stating the terms upon which they would insure his property, *Nelson*, J., said: "We are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them. And that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply, announcing the acceptance, has been transmitted. But in Falls *v.* Gaither, 9 Porter, 605, 614, a different opinion is declared. *Collier*, C. J., there says: "Since a proposition to sell imposes no obligation till accepted, it is, *in general*, competent for the party offering to withdraw it, any time previous to acceptance; and if he does so, a subsequent acceptance will not bind him, though made before the accepting party had notice of the withdrawal. To exemplify: suppose A has offered by letter to sell B a slave — B accepts the offer by addressing a letter to A, assenting to his terms; if the latter did not, previous to the date of B's letter, recall the offer, he is bound by the contract; but if he withdrew it by a letter *sent to* B, before B's letter was written, the acceptance of the latter would be unavailing for any legal purpose; and this too, though the letter of withdrawal was not received. This example rests upon the well settled rule, that the concurrence of both parties is essential to a contract of sale, though given at different times."

[1] See Potter *v.* Sanders, 6 Hare, 1; Dunlop *v.* Higgins, 1 House of Lords Cases, 381; Tayloe *v.* Merchants' Fire Ins. Co. 9 How. 390; Duncan *v.* Topham, 8 C. B. 225; Vassar *v.* Camp, 14 Barb. 341; Levy *v.* Cohen, 4 Geo. 1; Chiles *v.* Nelson, 7 Dana, 281; Hamilton *v.* Lycoming Mutual Ins. Co. 5 Barr. 339.

settled; but the *dicta* of judges, and the principles on which the later decisions rest, would seem to lead to the conclusion that the contract is entirely complete as soon as the letter is in the post-office.

The party making the offer by letter is not bound to use the same means for withdrawing it, which he uses for making it. Thus, if A in the case just supposed, a week after he has sent his offer by letter, telegraphs a withdrawal to B, and this withdrawal reaches him before he accepts the offer, this withdrawal is effectual.[1]

SECTION V.

WHAT EVIDENCE MAY BE RECEIVED IN REFERENCE TO A WRITTEN CONTRACT.

If an agreement upon which a party relies be oral only, it must be proved by evidence, and any evidence tending to show what the contract was is admissible. But if the contract be reduced to writing, it proves itself; and now, no evidence whatever is receivable for the purpose of varying the contract or affecting its obligations. The reasons are obvious. The law prefers written to oral evidence, from its greater precision and certainty, and because it is less open to fraud. And where parties have closed a negotiation and reduced the result to writing, it is to be presumed that they have written all they intended to agree to, and therefore, that what is omitted was finally rejected by them.[2]

[1] In Sheffield Canal Co. *v.* Sheffield & Rotherham Rail. Co. 3 Rail. Cas. 121, where a treaty was commenced by letter, and in the course of the treaty an offer, made by letter, was verbally rejected; *held*, that the party who made the offer was relieved from his liability, notwithstanding a subsequent acceptance in writing.

[2] In Kane *v.* Old, 2 B. & C. 634, *Abbott*, C. J., said: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing may in some cases be received in evidence, as showing the inducement to the contract, such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation, unless he can also show that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist." See also Pickering *v.* Dowson, 4 Taunt. 786; Preston *v.* Merceau, 2 Wm. Bl. 1249; Carter *v.* Hamilton, 11 Barb. 147; The Troy Iron and Nail Factory *v.* Corning, 1 Blatch. C. C. 467; Meres *v.* Ansell, 3 Wils. 275; Hakes *v.* Hotchkiss, 23 Vt. 231; Vt. Central R. R. Co. *v.* Estate of Hills, id. 681.

But some evidence may always be necessary, and therefore admissible; as evidence of the identity of the parties to the contract or of the things which form its subject-matter. And upon the whole, we cannot state the rule on this subject better than that, while no evidence is receivable to *contradict* or *vary* a written contract, all evidence — not otherwise inadmissible — may be received to explain its meaning and show what the contract is in fact.[1]

There are some obvious limitations to this rule. The first is, that as evidence is admissible only to explain the contract, if the contract needs no explanation, that is, if it be by itself perfectly explicit and unambiguous, evidence is inadmissible, because it is wholly unnecessary excepting to vary the meaning and force of the contract, and that is not permitted.[2] Another, following from this, is, that if the evidence purports, under the name of explanation, to give to the contract a meaning which its words do not fairly bear, this is not permitted, because such evidence would in fact make a new contract.[3]

A frequent use of oral evidence is to explain, by means of persons experienced in the subject-matter of the contract, the meaning of technical or peculiar words and phrases; and such witnesses are called experts, and are very freely admitted.[4]

[1] "When there is a devise of the estate purchased of A, or of the farm in the occupation of B, nobody can tell what is given till it is shown by extrinsic evidence what estate it was that was purchased of A, or what farm was in the occupation of B." Per Sir William *Grant*, in Sanford *v.* Raikes, 1 Mer. 653. Again, in Clayton *v.* Lord Nugent, 13 M. & W. 207, *Rolfe*, B., says: "Speaking philosophically, you must always look beyond the instrument itself to some extent, in order to ascertain who is meant; for instance, you must look to names and places. There may indeed be no difficulty in ascertaining who is meant, when a person who has five or six names, and some of them unusual ones, is described in full; while on the other hand, a devise simply to John Smith would necessarily create some uncertainty." See also Owen *v.* Thomas, 3 Mylne & K. 353.

[2] In Pierson *v.* Hooker, 3 Johns. 68, one of several partners executed a deed of release in due form in the name of the partnership, whereby he released the defendant from all debts and demands of every nature and kind whatsoever; *held*, that parol evidence was inadmissible to show that a particular debt was not intended to be released.

[3] In Doe *v.* Oxenden, 3 Taunt. 147, a testator made a devise, using these words — "my estate of Ashton." He had a maternal estate comprehending several distinct estates in Ashton parish, and some others in adjacent parishes, some ten or fifteen miles distant; *held*, that evidence was not admissible to show that he was accustomed to call all his maternal estate his Ashton estate; and intended to devise the same by that name. And see Doe *v.* Greening, 3 M. & S. 171; Doe *v.* Lyford, 4 M. & S. 550; Miller *v.* Travers, 8 Bing. 244; Hunt *v.* Adams, 7 Mass. 518.

[4] In Coblet *v.* Bachey, 3 Sim. 24, a statuary bequeathed articles used in his business by their technical names, some of which were very obscurely written; and persons who were skilled in writing and acquainted with articles used by statuaries, were called to explain the meaning of the will. If a contract contains words used in a technical

It may be remarked too, that a written receipt for money is not within the general rule as to written contracts, being always open, not only to explanation, but even to contradiction by extrinsic evidence. But this is true only of a simple receipt. If a written instrument not only recites or acknowledges the receiving of money or goods, but contains also a contract or grant, such instrument as to the contract or grant, is no more to be affected by extrinsic evidence than if it contained no receipt; but as to the receipt itself, it may be varied or contradicted in the same manner as if it contained nothing else.[1]

A certain legal inference from a written promise, can no more be rebutted by evidence, than if it were written. Thus, it is not only true that if A, by his note, promises to pay B a sum of money in sixty days, he cannot when called upon resist the claim by proving that B, when the note was made, agreed to wait ninety days; but if A promise to pay money and no time is set, this is by force of law a promise to pay on demand, and evidence is not receivable to show that a distant period was agreed upon.[2] Still, where a contract is *entire*, and a part only is reduced to writing, and the law does not supply the residue, evidence may be received to prove that residue; but not if it materially changes or contradicts what is written.[3]

sense; Shore *v.* Wilson, 9 Cl. & Fin. 511, 568; Smith *v.* Wilson, 3 B. & Ad. 728; or words of a foreign language; Cabarga *v.* Seeger, 17 Penn. St. 514; Sheldon *v.* Benham, 4 Hill, 129; or characters which are difficult to be deciphered; Norman *v.* Morrell, 4 Ves. 769; Masters *v.* Masters, 1 P. Wms. 425; an expert may be admitted to explain them.

[1] Bell *v.* Bell, 12 Penn. St. 235; Dutton *v.* Tilden, 13 id. 46; Kirkpatrick *v.* Smith, 10 Humph. 188; Cole *v.* Taylor, 2 N. Jer. 59; Fuller *v.* Crittenden, 9 Conn. 401; Straton *v.* Rostall, 2 T. R. 366. Thus, a bill of lading, in the usual form, is a receipt for the quantity of goods shipped, and also a promise to transport and deliver the same; and so far as such a bill of lading is a receipt it may be controlled by parol proof. Therefore, in a suit by the shipper upon such a bill for the non-delivery of goods shipped, it is competent for the defendant to prove that the quantity of goods received was less than that acknowledged in the bill. O'Brien *v.* Gilchrist, 34 Maine, 554. In Tisloe *v.* Graeter, 1 Blackf. 353, where in a receipt money was acknowledged to have been received "for safe keeping," it was held that evidence was not admissible to show that the money was not deposited for safe keeping, but was in discharge of a debt. See also Egleston *v.* Knickerbacker, 6 Barb. 458; Smith *v.* Brown, 3 Hawks, 580; May *v.* Babcock, 4 Ohio, 346; Stone *v.* Vance, 6 Ham. (Ohio,) 246; Wood *v.* Perry, Wright, (Ohio,) 240; Graves *v.* Harwood, 9 Barb. 477; Wayland *v.* Mosely, 5 Ala. 430.

[2] Thompson *v.* Ketchum, 8 Johns. 189; Warren *v.* Wheeler, 8 Metc. 97; Atwood *v.* Cobb, 16 Pick. 227; Ryan *v.* Hall, 13 Metc. 520; Barringer *v.* Sneed, 3 Stew. 201; Simpson *v.* Henderson, M. & Malk. 300.

[3] In Jeffrey *v.* Walton, 1 Stark. 267, in an action for not taking proper care of a horse hired by the defendant of the plaintiff, the following memorandum, made at the time of hiring, was offered in evidence: "Six weeks at two guineas, Wm. Walton,

The construction or interpretation of a written contract may sometimes be very material to the interests or rights of third parties, who had nothing to do with writing it, and were in no way privy to it. In such case, these parties may show by evidence what the contract which purports to have been written, really was as between the parties to it.[1]

Generally speaking, all written instruments are construed and interpreted by the law according to the simple, customary, and natural meaning of the words used.

It should be added that when a contract is so obscure or uncertain, that it must be set wholly aside, as no contract whatever, it can have no force or effect upon the rights or relations of the parties, but they are remitted to their original rights and obligations.

Jr." Lord *Ellenborough* regarded the memorandum as incomplete, but conclusive as far as it went. "The written agreement," said he, "merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms; but I am of opinion that it is competent to the plaintiff to give in evidence suppletory matter as a part of the agreement." See Edwards *v.* Goldsmith, 16 Penn. St. 43; Knapp *v.* Harden, 6 C. & P. 745; Deshon *v.* Merchants' Ins. Co. 11 Metc. 199.

[1] Parol evidence may be introduced to contradict a written instrument when both or only one of the parties to the suit are strangers to the instrument. Reynolds *v.* Magness, 2 Ired. 26; Krider *v.* Lafferty, 1 Whart. 303; Strader *v.* Lambeth, 7 B. Mon. 589; Venable *v.* Thompson, 11 Ala. 147; Taylor *v.* Baldwin, 10 Barb. 582; The King *v.* Laindon, 8 T. R. 379.

CHAPTER III.

OF CONSIDERATION.

SECTION I.

OF THE NEED OF A CONSIDERATION.

It is an ancient and well-established rule of the common law of England and of this country, that no promise can be enforced at law, unless it rests upon a *consideration.* If it do not, it is called a *nudum pactum;* and the promisor, even if he admits his promise, is under no legal obligation to perform it.[1]

There are two exceptions to this rule. One is when the promise is made by a sealed instrument, or deed; for every written instrument which is sealed is a deed. Here the law is said to imply a consideration; the meaning of which is that it does not require that any consideration should be proved. The seal itself is said to be a consideration, or to import a consideration.[2]

[1] Bro. Abr. *action sur le case*, 40; 3 Hen. 6, 36, pl. 33; 17 Ed. 4, pl. 4; 2 Bl. Comm. 445; Eastwood *v.* Kenyon, 11 Ad. & E. 438; Cook *v.* Bradley, 7 Conn. 57; Dodge *v.* Burdell, 13 Conn. 170; Bean *v.* Burbank, 16 Maine, 458; Burnet *v.* Bisco, 4 Johns. 235; People *v.* Shall, 9 Cow. 778. And see American Law Register, vol. 2, (1854,) pp. 257, 385, 449. This rule is said to have been borrowed from the civil law, in which the maxim, "*Ex nudo pacto non oritur actio*," was applied to all contracts. 2 Bl. Comm. 445. But the *nudum pactum* of the civil law was not the same as that now recognized by our common law. The civilians only applied the term to those contracts which had not been entered into with the requisite formalities, without reference to the duties imposed upon one party, which were to be performed without recompense by the other. Vin. Comm. de Inst. lib. 3, tit. 14, p. 659.

[2] See Irons *v.* Smallpiece, 2 B. & Ald. 551. In Sharington *v.* Strotton, Pl. Com. 308, *Plowden, arguendo*, says: — "Words pass from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party, without examining upon what cause or consider-

The second exception relates to negotiable paper; and is an instance in which the law merchant has materially qualified the common law. We shall speak more fully of this exception when we treat of negotiable paper.

The word "consideration," as it is used in this rule, has a peculiar and technical meaning. It denotes some substantial cause for the promise. This cause must be one of two things; either a benefit to the promisor, or else an injury or loss to the promisee, sustained by him at the instance and request of the promisor. Thus, if A promises B to pay him a thousand dollars in three months, and even promises this in writing, the promise is worthless in law, if A makes it as a merely voluntary promise, without consideration. But if B, or anybody else, gives to A to-day a thousand dollars in goods or money, and this was the ground and cause of the promise, then it is enforceable. And if A got nothing for his promise, but B, at the request of A, gave the same goods or money to C, this would be an equally good consideration, and the promise would be equally valid in law.[1]

This rule sometimes operates harshly and unjustly, and permits promisors to break their word under circumstances calling strongly for its fulfilment. Courts have been led, perhaps, by this to moderate the rule, by saying that the consideration is sufficient if it be a substantial one, although it be not an adequate one. This is the unquestionable rule now.[2]

ation they were made." See also Shubrick *v.* Salmond, 3 Burr. 1639; Fallowes *v.* Taylor, 7 T. R. 477; Morley *v.* Boothby, 3 Bing. 111; Sumner *v.* Williams, 8 Mass. 200; Page *v.* Trufant, 2 Mass. 159; Green *v.* Thomas, 2 Fairf. 318; Belden *v.* Davies, 2 Hall, 433; Dale *v.* Roosevelt, 9 Cow. 307. In some of the United States, however, either by usage or statute, a want or failure of consideration is a good defence to an action upon a sealed agreement. See Walker *v.* Walker, 13 Ire. 335; Peebles *v.* Stephens, 1 Bibb, 500; Coyle *v.* Fowler, 3 J. J. Marsh. 473; Case *v.* Boughton, 11 Wend. 106; Leonard *v.* Bates, 1 Blackf. 173; Swift *v.* Hawkins, 1 Dallas, 17; Gray *v.* Handkinson, 1 Bay, 278; State *v.* Gaillard, 2 Bay, 11; Solomon *v.* Kimmel, 5 Binn. 232. And an exception to the general rule also exists in the case of contracts in restraint of trade, which, although under seal, require a consideration. See Homer *v.* Ashford, 3 Bing. 322; Mitchel *v.* Reynolds, 1 P. Wms. 181.

[1] Either of these causes constitutes a sufficient consideration to uphold a contract. Com. Dig., Action upon the case upon assumpsit, (B. 1); Pillans *v.* Van Mierop, 3 Burr. 1673; Nerot *v.* Wallace, 3 T. R. 24; Bunn *v.* Guy, 4 East, 194; Willatts *v.* Kennedy, 8 Bing. 5; Miller *v.* Drake, 1 Cains, 45; Powell *v.* Brown, 1 Johns. 100; Lemaster *v.* Buckhart, 2 Bibb, 30; Chick *v.* Trevett, 20 Maine, 462; Sampson *v.* Swift, 11 Vt. 315. See also Forster *v.* Fuller, 6 Mass. 58; Townsley *v.* Sumrall, 2 Pet. 182; Leonard *v.* Vredenburgh, 8 Johns. 29; Bailey *v.* Freeman, 11 Johns. 221; Stadt *v.* Lill, 9 East, 348; Tenney *v.* Prince, 4 Pick. 385.

[2] Hubbard *v.* Coolidge, 1 Met. 84. And in Clark *v.* Sigourney, 17 Conn. 511, it was held, that any act done by the promisee, at the request of the promisor, by which the

SECTION II.

WHAT IS A SUFFICIENT CONSIDERATION.

The law detests litigation; and considers any thing a sufficient consideration which arrests and suspends or terminates litigation.[1] Thus the compromise,[2] or forbearance,[3] or reference to arbitration[4] or any similar settlement of a suit, or of a claim,[5] is a good consideration for a promise founded upon it. And it is no defence to a suit on this promise, to show that the claim or suit thus disposed of would probably have been

former sustains any loss, trouble, or inconvenience, even of the most trifling description, if not utterly worthless in fact and in law, constitutes a sufficient consideration for a promise, although the promisor derives no advantage therefrom. Therefore where B, at the request of A, and at his sole risk, executed to him a deed of release, without covenants, of all B's right in certain land therein described, in consideration of which, A gave his promissory note to B for $300; and it afterwards appeared that B had no title to the land so conveyed; it was held, that the consideration of the note was sufficient. So, in Sanborn *v.* French, 2 Fost. 246, where the cases were examined with much learning and ability by *Perley*, J., it was held that, in the absence of fraud and mistake, the separate deed of a married woman, purporting to convey her land, though inoperative and void as a conveyance, is yet a sufficient consideration for a promissory note made payable to her. And the learned judge said: — "The court cannot inquire into the *amount* and *adequacy* of the consideration. If the contract is fairly made, with a full understanding of all the facts, the '*smallest spark*' of consideration is sufficient." See also Speed *v.* Phillips, 3 Anst. 732; Skeate *v.* Beale, 11 A. & E. 983; Hitchcock *v.* Coker, 6 A. & E. 438; Whittle *v.* Skinner, 23 Vt. 532; Low *v.* Barchard, 8 Ves. 133; McGhee *v.* Morgan, 3 Sch. & Lef. 395, n. (a); Floyer *v.* Sherard, Amb. 18; Coles *v.* Trecothick, 9 Vesey, 246; Kirwan *v.* Kirwan, 2 C. & M. 623; Phillips *v.* Bateman, 16 East, 272; Bedell *v.* Loomis, 11 N. H. 9; Johnson *v.* Titus, 2 Hill, 606. But gross inadequacy of consideration, in connection with other circumstances, may help to sustain a charge of fraud. See Prebble *v.* Bogherst, 1 Swanst. 329; Cockell *v.* Taylor, 15 E. L. & E. 101; Edwards *v.* Burt, 15 E. L. & E. 435; Johnson *v.* Dorsey, 7 Gill, 269; Judge *v.* Wilkins, 19 Ala. 765; Milnes *v.* Cowley, 8 Price, 620.

[1] Penn *v.* Lord Baltimore, 1 Ves. 444; Stopilton *v.* Stopilton, 1 Atk. 3; Wiseman *v.* Roper, 1 Chan. Rep. 158.

[2] As in Barlow *v.* Ocean Ins. Co. 4 Met. 270, where it was held, that the compromise of an action upon a policy of insurance, the result of a trial of the case being doubtful, was a sufficient consideration to uphold a promise. And see Zane *v.* Zane, 6 Munf. 406; Fisher *v.* May, 2 Bibb, 448; Taylor *v.* Patrick, 1 Bibb, 168; Durham *v.* Wadlington, 2 Strobh. Eq. 258; Hoge *v.* Hoge, 1 Watts, 216; Rice *v.* Bixler, 1 W. & S. 456.

[3] Atkinson *v.* Bayntun, 1 Bing. N. C. 444. See also 1 Roll. Abr. 24, pl. 33; Com. Dig., Action upon the case upon assumpsit, (B. 11); Willatts *v.* Kennedy, 8 Bing. 5; Morton *v.* Burn, 7 Ad. & E. 19; King *v.* Upton, 4 Greenl. 387; Elting *v.* Vanderlyn, 4 Johns. 237.

[4] Jones *v.* Boston Mill Corp. 4 Pick. 507; Hodges *v.* Saunders, 17 Pick. 470.

[5] Waterman *v.* Barrett, 4 Harring. 311; Stebbins *v.* Smith, 4 Pick. 97; Smith *v.* Weed, 20 Wend. 184; Hinman *v.* Moulton, 14 Johns. 466; Haigh *v.* Brooks, 2 Per. & Dav. 477; Whitbeck *v.* Whitbeck, 9 Cowen, 266; Brealey *v.* Andrew, 2 Nev. & P. 114; Davis *v.* Morgan, 4 B. & C. 8.

found to have no foundation or substance.[1] If the claim or suit be a mere pretence, or oppression, and have no reality whatever, and there is no rational possibility of enforcing it, then indeed it is nothing, and any settlement of it is also nothing, and a promise founded upon such settlement rests upon no consideration.[2] But if there be any honest claim, which he who advances it believes to be well grounded, and which within a rational possibility may be so, this is enough; the court will not go on and try the validity of the claim or of the suit in order to test the validity of a promise which rests upon their settlement; for the very purpose for which it favors this settlement is the avoidance of all necessity of investigating the claim by litigation.[3] But for reasons of public policy, no promise can be en-

[1] In Stapilton *v.* Stapilton, 1 Atk. 10, it was decided by Lord *Hardwicke*, "that an agreement entered into upon a supposition of rights, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation for an agreement." And in O'Kesson *v.* Barclay, 2 Penn. 531, it was held that the compromise of an action of slander, in which the words laid in the declaration were not actionable, was a sufficient consideration to sustain a promise. And see also, Bennet *v.* Paine, 5 Watts, 259; Moore *v.* Fitzwater, 2 Rand. 442; *Ex parte* Lucy, 21 E. L. & E. 199.

[2] This principle is well illustrated by the case of Wade *v.* Simeon, 2 C. B. 548. The declaration stated that the plaintiff had brought an action against the defendant in the Exchequer, to recover certain moneys, which action was about to be tried, and that in consideration that the plaintiff would forbear proceeding in that action until a certain day, the defendant promised on that day to pay the amount, but that he had made default, &c. Plea, that the plaintiff never had any cause of action against the defendant in respect to the subject-matter of the action in the Exchequer, which he the plaintiff well knew. Upon general demurrer, this plea was held sufficient. and *Tindal*, C. J., said: "By demurring to that plea the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be, for, in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full consideration for all the legal damage he may sustain. The consideration, therefore, altogether fails. On the part of the plaintiff, it has been urged, that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises to forbear *commencing* proceedings. I must however confess, that, if it were so, I do not see that it would make any substantial difference." And see Gould *v.* Armstrong, 2 Hall, 266; Lowe *v.* Weatherley, 4 Dev. & Bat. 212; Jones *v.* Ashburnham. 4 East, 455; Smith *v.* Algar, 1 B. & Ad. 604.

[3] Longridge *v.* Dorville, 5 B. & Ald. 117; Thornton *v.* Fairlie, 2 Moore, 397; Richardson *v.* Mellish, 2 Bing. 229; Atlee *v.* Backhouse, 3 M. & W. 648; Wilbur *v.* Crane, 13 Pick. 284; Mills *v.* Lee, 6 Monroe, 97; Union Bank *v.* Geary, 5 Pet. 114; Bennet *v.* Paine, 5 Watts, 259; Stracy *v.* Bank of England, 6 Bing. 754.

forced of which the consideration was the discontinuance of criminal proceedings, or of any in which the public are interested.[1]

If any work or service is rendered to one, or for one, and he requested the same, it is a good consideration for a promise of payment; and not only so, but the law will imply the promise.[2] The rule is the same as to goods, or property of any kind delivered to any one at his request.[3] No person can make another his debtor against that other's will, by a voluntary offer of work, or service, or money, or goods.[4] But if that other accept what is thus offered, and retain the benefit of it, the law will, generally, imply or presume that it was offered at the request of that other party, and will also imply his promise to pay for it, and will enforce the promise.[5]

If A agrees with B to work for him one year, or any stated time, for so much a month, or so much for the whole time, and after working a part of the time, leaves B without good cause, the question arises whether A can recover any thing from B for the service he has rendered. It is universally conceded that he cannot *on the contract*, because that is *entire*, and is broken by A, and therefore A has no claim under it. And it is the ancient and still prevailing rule, that A can recover nothing in any form.[6] It has however been held in New Hampshire, that A can still recover whatever his services are worth, B having the right to

[1] Coppock *v.* Bower, 4 M. & W. 361.

[2] 1 Rol. Abr. 11, pl. 2, 3; Hunt *v.* Bate, Dyer, 272; Taylor *v.* Jones, 1 Ld. Raym. 312; Newel *v.* Keith, 11 Vt. 214; Tipper *v.* Bicknell, 3 Bing. N. C. 710; 1 Wms. Saund. 264, n. (1); Abbot *v.* Hermon, 7 Greenl. 118.

[3] Brackett *v.* Norton, 4 Conn. 524; Pichards *v.* Sears, 6 Ad. & El. 474.

[4] In Frear *v.* Hardenburgh, 5 Johns. 272, where A entered on land belonging to B, and without his knowledge or authority, cleared it, made improvements, erected buildings, &c., and B afterwards promised to pay A for the improvements he had made, it was *held* that the promise to pay for the work done and improvements made, without the request of B, was a *nudum pactum* on which no action could be maintained. And see 1 Rol. Abr. 11, pl. 1; Hunt *v.* Bate, Dyer, 272, a; Hayes *v.* Warren, 2 Str. 933; Dogget *v.* Vowell, Moore, 643; Jeremy *v.* Goochman, Cro. Eliz. 442; Roscorla *v.* Thomas, 3 Q. B. 234; Bartholomew *v.* Jackson, 20 Johns. 28.

[5] As in Abbott *v.* Hermon, 7 Greenl. 118, where one built a school-house under a contract with persons assuming to act as a district committee, but who had no authority; and a district school was afterwards kept in it by direction of the school agent. This was held to be an acceptance of the house on the part of the district, binding the inhabitants to pay the reasonable value of the building. And see Weston *v.* Davis, 24 Maine, 374; Law *v.* Wilkin, 6 Ad. & E. 718; Nichole *v.* Allen, 3 C. & P. 36. But see as to this last case, Mortimore *v.* Wright, 6 M. & W. 485.

[6] Thorpe *v.* White, 13 Johns. 53; M'Millan *v.* Vanderlip, 12 Johns. 165; Jennings *v.* Camp, 13 Johns. 94; Mullen *v.* Gilkinson, 19 Vt. 503; Davis *v.* Maxwell, 12 Met. 286; Stark *v.* Parker, 2 Pick. 267; Olmstead *v.* Beale, 19 Pick. 528; Shaw *v.* Turnp. Co. 2 Penn. 454; Eldridge *v.* Rowe, 2 Gilman, 91; Lantry *v.* Parks, 8 Cowen, 63; Marsh *v.* Rulesson, 1 Wend. 514; Monell *v.* Burns, 4 Denio, 121.

set off or deduct the amount of any damage he may have sustained from A's breach of the contract.[1] We think this view just and reasonable, although it has not been supported by adjudication in other States. If A agrees to sell to B five hundred barrels of flour at a certain price, and after delivering one half refuses to deliver any more, B can certainly return that half, and pay A nothing. But if B chooses to retain that half, or if he has so disposed of or lost it that he cannot return it, he must, generally at least, pay what it is worth, deducting all that he loses by the breach of the contract. And this case we think analogous to that of a broken contract of service.[2]

A difficulty sometimes arises where A, at the request of B, undertakes to do something for B, for which he is to be paid a certain price; and in doing it he departs materially from the directions of B and from his own undertaking. What are now the rights of the parties? This question arises most frequently in building-contracts, in which there is perhaps usually some departure from the original undertaking. The general rules are these. If B assent to the alteration, it is the same thing as if it were a part of the original contract.[3] He may assent expressly, by word or in writing, or constructively, by seeing the work, and approving it as it goes on, or being silent; for silence under such circumstances would generally be equivalent to an approval.[4] But if the change be one which B had a right, either from the nature of the change, or the appearance of it, or A's language respecting it, to suppose would add nothing to the cost, then no

[1] In Britton *v.* Turner, 6 N. H. 481, this whole subject was ably examined by *Parker*, J., and the court came to the conclusions stated in the text.

[2] In New York, however, it is *held* that B cannot be compelled to pay any thing in this last case. See Champlin *v.* Rowley, 13 Wend. 258, 18 Id. 187; Mead *v.* Degolyer, 16 Wend. 632; McKnight *v.* Dunlop, 4 Barb. 36; Paige *v.* Ott, 5 Denio, 406.

[3] See Dubois *v.* Del. & Hud. Canal Co. 12 Wend. 334; Preston *v.* Finney, 2 W. & S. 53; Albany Dutch Church *v.* Bradford, 8 Cowen, 457.

[4] Hayward *v.* Leonard, 7 Pick. 181. In this case, A contracted in writing to build a house for B, within a certain time, of certain dimensions, and in a certain manner, and afterwards built the house within the time, and of the dimensions agreed upon, but in workmanship and materials varying from the contract. B was present almost every day during the building, and had an opportunity of seeing the materials and labor, and objected at times to part of the materials and work, but continued to give directions about the house, and ordered some variations from the contract. He expressed himself satisfied with parts of the work from time to time, though professing to be no judge of it. Soon after the house was done, he refused to accept it, but A had no knowledge that he intended to refuse it until after it was finished. It was *held* that A might maintain an action against B on a *quantum meruit* for his labor, and on a *quantum valebant* for the materials. See also Norris *v.* Windsor, 4 Fairf. 293; Wilhelm *v.* Caul, 2 W. & S. 27; Adams *v.* Hill, 16 Maine, 215.

promise to pay an increased price would be inferred from either an express or tacit approval.[1] Generally, as we have seen, if A does or makes what B did not order or request, B can refuse to accept it, and if he does, he will not then be held to pay for it. But if he accepts it, he must pay for it. This consequence results, however, only from a voluntary acceptance. For if A choose, without any request from B, to add something to B's house, or make some alteration in it, which being done cannot be undone or taken away without detriment to the house, B may hold it, and yet not be liable to pay for it; and A has no right to take it away, unless he can do so without inflicting any injury whatever on B.[2] This rule would apply whether the addition or alteration were larger or smaller.

It is sometimes provided in building contracts that B shall pay for no alteration or addition unless previously ordered by him in writing. But if there be such provision, B would be liable for any alteration or addition he ordered in any way, or voluntarily accepted.

So it is sometimes agreed that any additions or alterations shall be paid for at the same rate as the work contracted for. But we think that the law would imply this agreement if the parties did not make it expressly.[3]

[1] In Lovelock *v.* King, 1 Moo. & R. 60, a very important and wholesome principle was laid down by Lord *Tenterden* upon the subject of extra work. The action was *assumpsit* upon a carpenter's bill for alterations in a house of the defendant. In summing up to the jury, his lordship said: "That the case, although very common in its circumstances, involved a very important principle, and required their very serious consideration. In this case, as in most others of the kind, the work was originally undertaken on a contract for a fixed sum. A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend upon this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce any increase of labor and expenditures; and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract. Sometimes, indeed, the nature of the alterations will be such that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed at the time of the consent, that the effect of the alteration will be to increase the expense of the work."

[2] It was *held* by Lord *Tenterden*, in Wilmot *v.* Smith, 3 C. & P. 453, that if A agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned because the buyer will not pay an increased price on account of the better materials.

[3] But this point is not well settled. See Jones *v.* Woodbury, 11 B. Mon. 167; Farmer

A promise is a good consideration for a promise; and it is one which frequently occurs in fact.[1] But it is said that the promises must be mutual;[2] and sometimes questions of this sort have arisen; if A promises to live with B two years, for the purpose of learning a certain trade, but B makes no express promise, and A leaves at the end of one year, it has been said that B cannot recover damages, because there was no consideration for A's promise, inasmuch as B made no promise.[3] But we should rather say in such cases, that if A performed his promise, he might have an action against B on his constructive or implied promise to teach; and that this constructive or implied promise to teach was a sufficient consideration for A's promise to stay with B.[4]

So, if A says to B, "If you will deliver goods to C, I will pay

v. Francis, 12 Iredell, 282; Tebbetts *v.* Haskins, 16 Maine, 288; McCormick *v.* Connoly, 2 Bay, 401; Wright *v.* Wright, 1 Litt. 179; Dubois *v.* Del. & Hud. Canal Co. 12 Wend. 334.

[1] See White *v.* Demilt, 2 Hall, 405, which was *assumpsit* for breach of the defendant's contract to sell and deliver certain goods to the plaintiff. It was *held* that the *promise* of the latter to accept the goods and pay for them was a good consideration for the defendant's promise to deliver them. And in McNiell *v.* Reid, 2 Moore & S. 89, which was an action for the breach of an agreement entered into by one of several partners to admit a stranger into the firm, it was *held* that it was a sufficient consideration for the defendant's promise that the plaintiff had promised and was willing to become a partner. And see also Howe *v.* O'Mally, 1 Murph. 287; Miller *v.* Drake, 1 Caines, 45; Gower *v.* Capper, Cro. Eliz. 543; Wentworth *v.* Bullen, 9 B. & C. 840; Cartwright *v.* Cooke, 3 B. & Ad. 703.

[2] In Lester *v.* Jewett, 12 Barb. 502, the plaintiff brought an action upon an instrument executed by defendant, whereby he agreed, at the expiration of one year from its date, to purchase of the plaintiff thirty shares of the capital stock of the Southern Life Insurance and Trust Company, for the sum of three thousand dollars. It was *held* that the agreement on the part of the defendant to purchase was void for want of mutuality, there being no corresponding obligation on the plaintiff to sell. And see Governor, &c. of Copper Miners *v.* Fox, 3 E. L. & E. 420; McKinly *v.* Watkins, 13 Ill. 140; Nichols *v.* Raynbred, Hob. 88; Biddel *v.* Dowse, 6 B. & C. 255; Dorsey *v.* Packwood, 12 How. 126.

[3] Lees *v.* Whitcomb, 2 M. & P. 86, which was *assumpsit* for the breach of the following written agreement; "I hereby agree to remain with Mrs. D. (the plaintiff's wife) for two years from the date hereof, for the purpose of learning the business of a dressmaker, &c." *Held* that such agreement was *nudum pactum*, and not binding, as it contained no engagement by the plaintiff or his wife to teach. And see, to the same effect, Sykes *v.* Dixon, 9 Ad. & E. 693.

[4] In Phelps *v.* Townsend, 8 Pick. 392, the defendant gave the plaintiffs a written contract, by which, after reciting that he placed his son with the plaintiffs to learn the art of printing, "to stay till he is twenty-one years of age," the defendant agreed, in consideration of the son's being so old, (he was then eighteen) to pay the plaintiff a stipulated amount if the son did not continue in the plaintiff's employment six months after he was twenty-one. The son entered into the plaintiff's employment in pursuance of the agreement, and was instructed in the art of printing for some months, when he left the plaintiffs without cause. An action being brought upon this agreement, it was objected that the contract was void for want of mutuality, there being no obligation on the plaintiffs to do any thing which might form a consideration for the defendant's promise. But the court said, "that the acceptance of the contract by the plaintiffs, and the execution of it in part by receiving the apprentice, created an obligation on their part to maintain and instruct the defendant's son."

for them," although there is no obligation upon B to deliver the goods, and therefore no mutuality in the contract, yet, if he does deliver them, he furnishes a consideration for the agreement, and may enforce it against A.[1] There is also an exception to this requirement of mutuality in the case of contracts between infants and persons of full age. For though the infant may avoid his contract, the adult is bound.[2]

An agreement by two or more parties to refer disputes or claims between them to arbitration, is not binding upon any of the parties unless all have signed it.[3]

This principle, that a promise is a good consideration for a promise, has been sometimes applied to subscription papers; all who sign them being held on the ground that the promise of each is a good consideration for the promises of the rest.[4] But they are not often promises to each other; being generally the promise of all the subscribers to some third party who makes no promise. The law on the subject of these subscription papers, and of all voluntary promises of contribution, is as yet somewhat unsettled, the cases not being reconcilable. The prevailing rule seems, however, to be this; no such promises are binding, unless something is paid for them, or unless some party for whose benefit they are made — and this party may be one or more of the subscribers — at the request, express or implied, of the promisors, and on the faith of the subscriptions incurs, actual expense or loss, or enters into valid contracts with other parties which will occasion expense or loss.[5] As the objection to these promises is

[1] L'Amoreux *v.* Gould, 3 Seld. 349; Parsons on Cont. pp. 375, 376. But see Dorsey *v.* Packwood, 12 How. 126.

[2] Warwick *v.* Bruce, 2 M. & S. 205; Holt *v.* Ward Clarencieux, 2 Str. 937; Hunt *v.* Peake, 5 Cow. 475; Willard *v.* Stone, 7 Cow. 22.

[3] See Antram *v.* Chace, 15 East, 212; Biddell *v.* Dowse, 9 D. & R. 404; Kingston *v.* Phelps, Peake, 227.

[4] See The Congregational Society in Troy *v.* Perry, 6 N. H. 164. In this case, which was *assumpsit* upon a promissory note, whereby the defendant, in consideration that a fund of one thousand dollars or upwards should be raised for the support of the ministry in the Congregational Society in Troy, promised to pay said society in part of the fund fifty dollars on demand, &c. The defendant objected that the note was void for want of a consideration; but the court *held*, that where several promise to contribute to a common object, which they wish to accomplish, the promise of each is a good consideration for the promise of the others. And see George *v.* Harris, 4 N. H. 533; per *Walworth*, C., in Stewart *v.* The Trustees of Hamilton College, 2 Denio, 416, 417.

[5] See the recent case of Barnes *v.* Perine, 9 Barb. 202, 15 Id. 249, 2 Kern. 18, where the rule is declared in accordance with what we have stated in the text, and the defendant held liable as coming within the terms of it. *Allen*, J., in delivering his opinion in the Court of Appeals, thus remarks upon the irreconcilable conflict in the authorities upon this question: "An attempt to reconcile all the cases which have been adjudged,

the want of consideration, it may perhaps be cured by a seal to each name, or by one seal which all the parties agree to consider the seal of each.

SECTION III.

OF ILLEGAL CONSIDERATIONS.

If the whole of a consideration, or if any part of the consideration of an entire and indivisible promise, be illegal, the promise founded upon it is void.[1] But if the consideration consists of separable parts, and the promise consists of corresponding separable parts, which can be apportioned and applied, part to part, there each illegality will affect only the promise resting on it; for in fact there are many considerations and many promises.[2]

If the consideration be entire and wholly legal, and the promise consists of separable parts, one legal and the other illegal, the promisee can enforce that part which is legal.[3] When a law

touching the validity of voluntary engagements to pay money for charitable, educational, religious, or other public purposes, would be fruitless; for, while circumstantial differences in the cases will explain and satisfactorily account for some of the diversities in the decisions, it will be found that there is, to some extent, a want of harmony in the principles and rules applied as tests of validity to that class of undertakings. The general principle is recognized in every case, that all simple contracts executory, whether in writing or verbal, must be founded upon a good consideration; that the want of a legally adequate consideration, that is, a consideration recognized as sufficient in law, will vitiate every executory contract not under seal; still, the objection of a want of consideration for promises like the one before us has not always been regarded with favor; and judges, considering defences of that character as breaches of faith towards the public, and especially towards those engaged in the same enterprize, and an unwarrantable disappointment of the reasonable expectations of those interested, have been willing, nay, apparently anxious, to discover a consideration which would uphold the undertaking as a valid contract; and it is not unlikely that some of the cases, in which subscriptions have been enforced at law, have been border cases, distinguished by slight circumstances from agreements held void for a want of consideration." These conflicting cases will be found fully collected in 1 Parsons on Cont. pp. 377, 378.

[1] Thus, in Hinesburgh *v.* Sumner, 9 Vt. 23, where a note was given in part for the compounding of penalties and suppressing of criminal prosecutions, it was *held* to be wholly void and uncollectable. And in Deering *v.* Chapman, 22 Maine, 488, where a part of the consideration of a note was spirituous liquors sold by the payee, in violation of the statute, such note was held to be wholly void. And see Collins *v.* Blantern, 2 Wilson, 347; Hall *v.* Dyson, 10 E. L. & E. 424; Gamble *v.* Grimes, 2 Cart. (Ind.) 392; Coulter *v.* Robertson, 14 Sm. & M. 18; Filson *v.* Himes, 5 Barr, 452; Woodruff *v.* Hinman, 11 Vt. 592; Armstrong *v.* Toler, 11 Wheat. 258; Brown *v.* Langford, 3 Bibb, 500; Donallen *v.* Lennox, 6 Dana, 91; Benyon *v.* Nettleford, 2 E. L. & E. 113.

[2] See Yundt *v.* Roberts, 5 S. & R. 141; Frazier *v.* Thompson, 2 W. & S. 235.

[3] In Bishop of Chester *v.* Freeland, Ley, 79, *Hutton*, J., lays down the rule that when a good thing and a void thing are put together in the same grant, the common law makes such construction that the grant shall be good for that which is good, and void for that which is void. And see to the same effect, Kerrison *v.* Cole, 8 East, 236; Norton *v.* Simmes, Hob. 14; per *Bronson*, J., in Leavitt *v.* Palmer, 3 Comst. 37; Bank of

provides a penalty for an act, that act is held to be illegal, although it is not expressly prohibited.[1]

SECTION IV.

OF IMPOSSIBLE CONSIDERATIONS.

So no contract or promise can be enforced by him who knew that the performance of it was wholly impossible; and therefore a consideration which is obviously and certainly impossible is not sufficient in law to sustain a promise.[2] But if one makes a promise, he cannot always defend himself when sued for non-performance by showing that performance was impossible; for it may be his own fault, or his personal misfortune, that he cannot perform it. He had no right to make such a promise, and must respond in damages; or if he had a right to make it in the expectation of performance, and this has become impossible subse-

Australasia *v.* Bank of Australia, 12 Jur. 189; Chase's Executors *v.* Burkholder, 18 Penn. 50; Leavitt *v.* Blatchford, 5 Barb. 9; Hook *v.* Gray, 6 Barb. 398.

[1] In Seidenbender *v.* Charles's Adm'rs, 4 S. & R. 160, *Tilghman*, C. J., said that he considered it as perfectly settled that an action cannot be sustained founded on a transaction prohibited by statute, although it be not expressly declared that the contract is void; and this principle is sustained by numerous cases. See 1 Parsons on Cont. 382, n. (*a*), where they will be found collected. As to the effect of the repeal of a prohibiting statute upon existing contracts, see Milne *v.* Huber, 3 McLean, 212.

[2] See Nerot *v.* Wallace, 3 T. R. 17. In this case a promise was made by the defendant to the assignees of a bankrupt, when the latter was on his last examination, that in consideration that the assignees would forbear to have the bankrupt examined, and that the commissioners would desist from taking such examination, touching moneys alleged to have been received by the bankrupt and not accounted for, he, the defendant, would pay such moneys to the assignees. This promise was held by the court to be illegal, as being against the policy of the bankrupt laws. And Lord *Kenyon* said: "I do not say that this is *nudum pactum;* but the ground on which I found my judgment is this; that every person who in consideration of some advantage, either to himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact, but in law. Now the promise made by the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform; because the commissioners had nevertheless a right to examine the bankrupt; and no collusion of the assignees could deprive the creditors of the right of examination which the commissioners would procure them." And *Ashurst*, J., said: "In order to found a consideration for a promise, it is necessary that the party by whom it is made should have the power of carrying it into effect; and, secondly, that the thing to be done should in itself be legal. Now it seems to me that the consideration for this promise is void on both these grounds. The assignees have no right to control the discretion of the commissioners; and it would be criminal in them to enter into such an agreement; because it is their duty to examine the bankrupt fully, and the creditors may call on them to perform it. And for the same reason the thing to be done is also illegal." And see Shep. Touch. 164; 2 Bl. Com. 341; 22 Am. Jur. 20; Co. Litt. 206 a; Bates *v.* Cort, 2 B. & C. 474.

quently — as by loss of property, for example — this is his misfortune, and no answer to a suit on the promise.[1] There are, however, obviously promises or contracts, which, from their very nature, must be construed as if the promisor had said, "I will do so and so, if I can." For example, if A promises to work for B one year, at $20 a month, and at the end of six months is wholly disabled by sickness, he is not liable to an action by B for breach of his contract; and there is authority for saying that he can recover his pay for the time that he has spent in B's service.[2]

SECTION V.

OF FAILURE OF CONSIDERATION.

If a promise be made upon a consideration which is apparently valuable and sufficient, but which turns out to be nothing; or if the consideration was originally good, but becomes wholly valueless before part performance on either side, there is an end of the contract, as the promise cannot be enforced.[3] And if money were paid on such a consideration, it can be recovered back.[4] But it is said that only the sum paid can be so recovered, without any increase or addition as compensation for plaintiff's loss and disappointment.[5]

[1] Blight *v.* Page, 3 B. & P. 296, note; Worsley *v.* Wood, 6 T. R. 718; Tufnell *v.* Constable, 7 Ad. & El. 798. In the recent case of Harmony *v.* Bingham, 1 Duer, 209, 2 Kern. 99, where the defendant agreed to transport merchandise from New York, and deliver it at Independence, in Missouri, within twenty-six days, which he failed to accomplish within that time, it was *held* by the Court of Appeals, affirming the decision of the Superior Court of the city of New York, that the fact that a public canal, upon which the goods were intended to be transported a part of the distance, was rendered impassable by an unusual freshet, and that this occasioned the detention, was not a legal excuse therefor. So it has been *held* that it is not a valid excuse for the non-performance of an agreement to deliver goods of a certain quality, that goods of that quality were not to be had at the particular season when the contract was to be executed. Youqua *v.* Nixon, 1 Pet. C. C. 221; Gilpins *v.* Consequa, 1 Pet. C. C. 91. And see Huling *v.* Craig, Addison, 342.

[2] Dickey *v.* Linscott, 20 Maine, 453; Fenton *v.* Clark, 11 Vt. 557; Seaver *v.* Morse, 20 Vt. 620; Fuller *v.* Brown, 11 Met. 440. But see Lord *v.* Wheeler, 1 Gray, 282; Oakley *v.* Morton, 1 Kern. 25.

[3] Treat *v.* Orono, 26 Maine. 217; Murray *v.* Carret, 3 Call, 373; Woodward *v.* Cowing, 13 Mass. 216; Moses *v.* Macferlan, 2 Burr. 1012; Wharton *v.* O'Hara, 2 N. & McCord, 65; Boyd *v.* Anderson, 1 Overton, 438.

[4] As in Boyd *v.* Anderson, *supra*, where A purchased a land-warrant, and being ignorant of its invalidity, sold it to B for a valuable consideration. The warrant afterwards being adjudged invalid, it was *held* that B might recover back the price in *assumpsit*. And see Sandford *v.* Dodd, 2 Day, 437; Colville *v.* Besley, 2 Denio, 139. But the failure of consideration must be total in order to warrant such recovery. Dean *v.* Mason, 4 Conn. 428; Charlton *v.* Lay, 5 Humph. 496.

[5] See Neel *v.* Deens, 1 N. & McCord, 210.

If the failure of consideration be partial only, leaving a substantial, though far less valuable consideration behind, this may still be a sufficient foundation for the promise, if that be entire.[1] But the promisor will then be entitled, by deduction, set-off, or in some other proper way, to due allowance or indemnity for whatever loss he may sustain as to those other parts of the bargain, or as to the whole transaction, from the partial failure of the consideration.[2] And if the promise be itself separable into parts, and a distinct part or proportion of the consideration failed, to which part some distinct part or proportion of the promise could be applied, that part can not be enforced, although the residue of the promise may be.

SECTION VI.

OF THE RIGHTS OF ONE WHO IS A STRANGER TO THE CONSIDERATION.

Formerly it was held that no one who was a stranger to the consideration could enforce a promise resting upon it.[3] But this

[1] See Franklin *v.* Miller, 4 Ad. & El. 599; Roberts *v.* Havelock, 3 B. & Ad. 404; Ritchie *v.* Atkinson, 10 East, 295; Boone *v.* Eyre, 1 H. Bl. 273, n. (a); Cutler *v.* Close, 5 C. & P. 337; Lucas *v.* Goodwin, 3 Bing. N. C. 737; Mondel *v.* Steel, 8 M. & W. 870.

[2] It was formerly held, that the only remedy was by cross-action. Morridge *v.* Jones, 3 Camp. 38; Tye *v.* Gwynne, 2 Camp. 346. But it is now at the election of the party to resort to the cross-action or not. In Farnsworth *v.* Garrard, 1 Camp. 38, Lord *Ellenborough* laid down the rule, that where the plaintiff declares on a *quantum meruit* for work and labor done and materials found, the defendant may reduce the damages by showing that the work was improperly done, and may entitle himself to a verdict by showing that it was wholly inadequate to answer the purpose for which it was undertaken. See also Mondell *v.* Steel, 8 M. & W. 858. This whole subject was ably considered by *Dewey*, J., in Harrington *v.* Stratton, 22 Pick. 510, which was an action by the payee against the maker of a promissory note given for the price of a chattel; and it was held competent for the defendant to prove in *reduction* of damages, that the sale was effected by means of false representations of the value of the chattel on the part of the payee, although the chattel had not been returned or tendered to him. And in delivering the opinion of the court, the learned judge said: "It is always desirable to prevent a cross-action where full and complete justice can be done to the parties in a single suit, and it is upon this ground that the courts have been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle, allowing evidence in defence or in reduction of damages, to be introduced rather than to compel the defendant to resort to his cross-action. As it seems to us the same purpose will be further advanced, and with no additional evils, by adopting a rule on this subject equally broad in its application to cases of actions on promissory notes, between the original parties to the same, as to actions on the original contract of sale, and holding that, in either case, evidence of false representations as to the quality or character of the article sold may be given in evidence to reduce the damages, although the article has not been returned to the vendor." And see Spalding *v.* Vandercook, 2 Wend. 431; Coburn *v.* Ware, 30 Maine, 202; Hammat *v.* Emerson, 27 Maine, 308; Perley *v.* Balch, 23 Pick. 286; Mixer *v.* Coburn, 11 Met. 559; Chapel *v.* Hickes, 2 C. & M. 214. But see Pulsifer *v.* Hotchkiss, 12 Conn. 234; Scudder *v.* Andrews, 2 McLean, 464.

[3] Bourne *v.* Mason, 1 Vent. 6, 2 Keb. 457; Crow *v.* Rogers, 1 Str. 592; Bull. N. P. 134; *Parke*, B., in Jones *v.* Robinson, 1 Exch. 454; Price *v.* Easton, 4 B. & Ad. 433.

rule has been considerably relaxed, at least in this country. Thus, if A pays to B a consideration, and B thereupon promises to pay C a sum of money, it has been held that C may sue B upon this promise, whether the promise were made to A or to C.[1] So where B gave to the lessee of certain premises a written promise to take the lease and pay to A, the lessor, the rent, with the taxes, according to the terms of the lease; and B afterwards entered into possession of the premises, and occupied them with the knowledge of A, it was held that A might recover against B on this promise.[2] So if A, B, and C, give a consideration jointly to D, whereupon D makes a promise to A, or B, or C, or any two of them, an action can be maintained on the promise by the party to whom it is given.[3]

SECTION VII.

OF THE CONSIDERATION ARISING FROM DISCHARGING THE DEBT OF ANOTHER.

If A is compelled to do for B that which B should have done, and was under an obligation to do, himself, A can now demand from B full indemnity or compensation; and, to enable him to enforce this claim, the law will imply or presume a request from B that A should do this thing, and also a promise from B to A of repayment or indemnity, which promise rests upon the sufficient consideration of A's doing, or undertaking to do, that thing.[4]

[1] Carnegie *v.* Morrison, 2 Met. 401. But where one person *covenants* with another to do an act for the benefit of a third, the action must be brought in the name of the party *with* whom the covenant is made. Hinkley *v.* Fowler, 15 Maine, 285; Johnson *v.* Foster, 12 Met. 167; Saunders *v.* Filley, 12 Pick. 554; Lord Southampton *v.* Brown, 6 B. & C. 718; Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith, 364.

[2] See Brewer *v.* Dyer, 7 Cush, 337.

[3] Cabot *v.* Haskins, 3 Pick. 83. And see also Farrow *v.* Turner, 2 A. K. Marsh. 496; Crocker *v.* Higgins, 7 Conn. 347; Miller *v.* Drake, 1 Caines, 45. In the recent case of Mellen *v.* Whipple, 1 Gray, 317, the Supreme Court of Massachusetts manifested a strong inclination to adhere to the old rule in all cases where an exception had not been firmly established by previous decisions. It was accordingly held in that case, that on a promise made to the vendor by the purchaser of an equity of redemption, to assume and cancel the mortgage on the premises, with the note for which it was given, no action lies by the mortgagee. And see Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith, 364; Blunt *v.* Boyd, 3 Barb. 209; Bigelow *v.* Davis, 16 Barb. 561.

[4] Pownall *v.* Ferrand, 6 B. & C. 439; Exall *v.* Patridge, 8 T. R. 308. And in Grissell *v.* Robinson, 3 Bing. N. C. 10, the plaintiffs having agreed with the defendant to give him a lease of certain premises, caused their attorney to prepare a lease, and paid him for it, and afterwards brought their action against the defendant to recover the amount so paid, as for money paid by them for defendant's use. And the evidence

This rule applies to all cases in which a surety or guarantor pays or does for his principal that which the principal undertook to do, and the surety undertook that he would do for the principal if the principal did not. The law considers that this request of the principal to the surety, and also this promise of indemnity, belong necessarily to such a relation.[1]

But the rule is quite otherwise where A without compulsion does for B what B was under an obligation to do for himself; as if A voluntarily pays to C a debt due from B to C. Here the law will not presume or imply both the request and the promise. If, therefore, neither be proved, A cannot enforce repayment from B; and the reason is that A cannot, as was before remarked, make himself the creditor of B without B's assent.[2] And this reason is more than merely technical, for B may have good ground for preferring to be the debtor of C, rather than of A. But if A can prove either the request or the promise, the law will conclusively presume the other. Thus, if A can prove that B requested him to pay his debt to C, the law will presume B's promise of repayment; or if A can prove that B promised to A a repayment, the law will consider this as an acknowledgment and acceptance of the payment as a service rendered to him, and

showing that it was the custom for the landlord's attorney to draw the lease, and for the lessee to pay for it, it was *held* that the plaintiffs were entitled to recover. And *Parke*, J., said: "As the plaintiffs were liable to their own attorney, in the first instance, and all the evidence shows that, according to the custom, the defendant is ultimately bound to pay for the lease, he must be taken to have impliedly assented to the payment made by the plaintiffs, and the action lies for money paid to his use." See also Davies *v.* Humphreys, 6 M. & W. 153; Jefferys *v.* Gurr, 2 B. & Ad. 833.

[1] Kemp *v.* Finden, 12 M. & W. 421; Fletcher *v.* Grover, 11 N. H. 368; Johnson *v.* Johnson, 11 Mass. 359; Horbach *v.* Elder, 18 Penn. 33. And see farther as to this subject, 1 Parsons on Cont. 32.

[2] Paynter *v.* Williams, 1 Cr. & M. 810. In this case a pauper, whose settlement was in the parish of A, resided in the parish of B, and whilst there received relief from the parish of A, which relief was afterwards discontinued, the overseers objecting to pay any more unless the pauper removed into his own parish. The pauper was subsequently taken ill and attended by an apothecary, who, after attending him nine weeks, sent a letter to the overseers of A, upon the receipt of which they directed the allowance to be renewed, and it was continued to the time of the pauper's decease. It was *held*, that the overseers of A were liable to pay so much of the apothecary's bill as was incurred after the letter was received. And *Bayley*, B., in delivering judgment, said: "I am of opinion that the parish is liable, and that the plaintiff can maintain the present action. The legal liability is not alone sufficient to enable the party to maintain the action, without a retainer or adoption on the part of the parish. The legal liability of the parish does not give any one who chooses to attend a pauper, and supply him with medicines, a right to call on them for payment. It is their duty to see that a proper person is employed, and they are to have an option who the medical man shall be. Wing *v.* Mill does not go the length of saying that a mere legal liability is enough; there must be a retainer or adoption. In that case, the parish officers were aware of the attendance and sanctioned it, because they applied to him to send in his bill."

will thereupon presume a previous request to A. And in either case A can recover from B on this promise.[1]

[1] Thus, in Wing *v.* Mill, 1 B. & Ald. 104, a pauper residing in the parish of A received during illness a weekly allowance from the parish of B, where he was settled. It was *held*, that an apothecary who had attended the pauper might maintain an action for the amount of his bill against the overseers of B, who expressly promised to pay the same. But without the express promise it would have been held otherwise. See Paynter *v.* Williams, in the preceding note.

CHAPTER IV.

OF SALES OF PERSONAL PROPERTY.

SECTION I.

WHAT CONSTITUTES A SALE.

It is important to distinguish carefully between a sale and an agreement for a future sale. This distinction is sometimes overlooked; and hence the phrase, an executory contract of sale, has come into use; but it is not quite accurate. Every actual sale is an executed contract, although payment or delivery may remain to be made. There may be an executory contract *for* sale, or a bargain that a future sale shall be made; but such a bargain is not a present sale; nor does it confer upon either party the rights or the obligations which grow out of the contract of sale.

A sale of goods is the exchange thereof for money. More precisely, it is the transfer of the property in goods from a seller to a buyer for a price paid or to be paid in money.[1] It differs from an exchange in law; for that is the transfer of chattels for other chattels; while a sale is the transfer of chattels for that which is the representative of all value.[2]

[1] Blackstone defines a sale to be "a transmutation of property from one man to another in consideration of some price or recompense in value." 2 Com. 246. Chancellor Kent says: "A sale is a contract for the transfer of property from one person to another for a valuable consideration." 2 Com. 463. But neither of these definitions seems to give the precise legal import of a sale, for the former applies equally well to an exchange or barter, and the latter relates more particularly to executory contracts, or mere agreements to sell. A sale is not so much "a contract for the transfer of property," as it is the actual transfer of the *right* to property, and this right passes as soon as the parties have agreed to the terms and conditions of the sale; for when the contracting parties clearly manifest their assent to a sale, the law immediately carries the intention into effect, and transfers the right of property from one to the other. Whether a sale has been completed, is a question of fact for the jury. De Ridder *v.* M'Night, 13 Johns. 294. See also Thurston *v.* Thornton, 1 Cush. 89.

[2] The distinction between sales and exchanges is thus stated in 3 Salk. 157: — "*Permutatio vicina est empitoni*, but exchanges were the original and natural way of com-

To constitute a sale at common law, all that is necessary is the agreement of competent parties that the property in the subject-matter shall then pass from the seller to the buyer for a fixed price.

The sale is made when the agreement is made. The completion of the sale does not depend upon the delivery of the goods by the seller, nor upon the payment of the price by the buyer. By the mutual assent of the parties to the terms of the sale, the buyer acquires at once the property and all the rights and liabilities of property; so that in case of any loss or depreciation of the articles purchased the buyer will be the sufferer, as he will be the gainer by any increase in their value.[1]

It is however a presumption of the law, that the sale is to be

merce, precedent to buying, for there was no buying till money was invented. Now in exchanging both parties are buyers and sellers, and both equally warrant; and as this is a *natural* rather than a *civil contract*, so by the *civil law* upon a bare agreement to exchange, without a delivery on both sides, neither of the parties could have an action upon such agreement, as they may in cases of selling; but if there was a delivery on one side and not of the other, in such case the deliverer might have an action to recover the thing which he delivered, but he could have no action to enforce the other to deliver what he agreed to deliver and which the deliverer was to have *in lieu* of that thing which he delivered to the other." And see Mitchell *v.* Gile, 12 N. H. 390; Vail *v.* Strong, 10 Vt. 457; Herring *v.* Marvin, 5 Johns. 393. The remedy upon a contract of exchange is by an action for damages for not delivering the goods according to the contract. Harrison *v.* Luke, 14 M. & W. 139. In this case the plaintiff and defendant agreed to barter goods for goods, and the defendant, having received the plaintiff's goods, omitted for nearly three years to send goods in return, whereupon the plaintiff brought this action, and declared for goods sold and delivered. *Held*, that the lapse of time did not entitle the plaintiff to maintain such an action, but that his remedy was by action against the defendant for not delivering the goods pursuant to the contract between them. And *Pollock*, C. B., said: "Where there is a contract of barter, and one of the parties omits to send goods in return, it cannot be contended that the other may bring an action for goods sold. No mere lapse of time will turn a contract of barter into a contract for goods sold."

[1] Potter *v.* Coward, 1 Meigs, 22; Hurlbut *v.* Simpson, 3 Ired. 233; Olyphant *v.* Baker, 5 Denio, 379; Bowen *v.* Burk, 13 Penn. St. 146; Frazer *v.* Hilliard, 2 Strobh. 309; Wing *v.* Clark, 24 Maine, 366; Hooban *v.* Bidwell, 16 Ohio, 509; Willis *v.* Willis, 6 Dana, 48; Crawford *v.* Smith, 7 ibid, 60; Simmons *v.* Smith, 5 B. & C. 862; Dixon *v.* Yates, 2 Nev. & Mann. 202; Gale *v.* Burnell, 7 Q. B. 850; Logan *v.* Le Mesurier, 11 Jurist, 1091; Bloxam *v.* Sanders, 4 B. & C. 948; Hinde *v.* Whitehouse, 7 East. 558; Com. Dig. Agreement, (B. 3); Atkin *v.* Barwick, 1 Strange, 167, where *Fortescue*, J., observes: — "Property by *our* law may be devested without an actual delivery; as a horse in a stable." The principle of the Roman civil law was different. The property (*dominium*) did not pass until delivery, and a perfect contract of sale had no effect upon the property, it being merely a personal contract binding the vendor, but not the specific goods. The common law rule is well stated in Noys's Maxims, p. 88. "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he is delivered; yet the property of the horse is, *by the bargain*, in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse and have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because, *by the bargain*, the property was in the buyer." See also Macomber *v.* Parker, 13 Pick. 183; Farnum *v.* Perry, 4 Law Reporter, 276; Willis *v.* Willis, 6 Dana, 48; Lansing *v.* Turner, 2 Johns. 13; Tarling *v.* Baxter, 6 B. & C. 360.

immediately followed by payment and delivery, unless otherwise agreed upon by the parties. If therefore nothing appears but a proposal and an acceptance, and the vendee departs without paying or tendering the price, the vendor may elect to consider it no sale, and may, therefore, if the buyer comes at a later period and offers the price and demands the goods, refuse to let him have them.[1] But a credit may be agreed on expressly, and the seller will be bound by it; and so he will be if the credit is inferred or implied from usage or from the circumstances of the case. And if there be a delivery and acceptance of the goods, or a receipt by the seller of earnest, or of part payment, the legal inference is that both parties agree to hold themselves mutually bound by the bargain. Then the buyer has either the credit agreed upon, or such credit as from custom or the nature or circumstances of the case is reasonable. But neither delivery, nor earnest, nor part-payment, are essential to the completion of a contract of sale.[2] They prevent the seller from rescinding the contract without the consent of the purchaser. Their effect upon sales under the provisions of the Statute of Frauds will be considered in the chapter on that subject.

SECTION II.

OF THE RIGHTS OF PROPERTY AND OF POSSESSION.

The word property is used in law in a strict and peculiar sense. It does not mean the thing owned, but the interest in the thing or the ownership of it. Hence property, or the right of property is often severed from the right of possession. This is

[1] This principle was regarded as settled law so long ago as the time of the Year Books. Thus, in 14 H. 8, 176, 216, (A. D. 1523), in the Common Pleas, *Pollard*, J., said: "Bargains and sales all depend upon communication and words between the parties; for all bargains can be to take effect instantly, or upon a thing to be done thereafter. They can be upon condition, and they can also be perfect; and yet no *quid pro quo* immediately. And all this depends upon the communication between you and me; as that I shall have £20 for my horse, and I agree; now if you do not pay the money immediately, this is not a bargain; for my agreement is for the £20, and if you do not pay the money straightway, you do not act according to my agreement. I ought, however, in this case, to wait convenient leisure, to wit, until you counted your money. But if you go to your house for money, am I obliged to wait? No, truly; for I would be in no certainty of my money or of your return; and therefore it is no contract unless this (delay) be agreed at the communication."

[2] Per *Holt*, C. J., in Langfort *v.* Tiler, 1 Salk. 113; Buller's N. P. 50; Knight *v.* Hopper, Skinner, 647; Hinde *v.* Whitehouse, 7 East, 571; Hurlburt *v.* Simpson, 3 Ired. 236.

sometimes obvious; as where the owner of a horse lets him out on hire for a week; the ownership or property of the owner is unaffected by this, but the hirer has for that week the right of possession. When a sale is completely made the *property* in the goods passes, as we have seen, from the seller to the buyer; that is, the buyer becomes at once the owner of the goods. But the possession may not pass to the buyer; and the right of possession does not pass to him, until he pays the price, unless it be a sale on credit.[1] If there be no credit, the seller acquires at once a right to the price; the buyer acquires at once the right of property, and the right to unite the right of possession to his right of property by paying or offering to pay the price. The seller, on the other hand, if he desires to enforce payment of the price, must deliver or offer to deliver the goods. Thus either party may compel the other to a performance of his part of the agreement by first performing or offering to perform his own.[2]

This right of the seller to retain possession of the property sold until the price is paid is called a lien. By this word lien, which is of frequent use in the law, is meant the right of retaining possession of property until some charge upon it or some claim on account of it, is satisfied. It rests therefore on possession. Hence the seller (and every other who has a lien,) loses it by voluntarily parting with the possession, or by a delivery of the goods.[3] And it is a delivery for this purpose, if he delivers a part without any purpose of severing that part from the remainder;[4] or if he make a symbolical delivery which vests this right and power of possession in the buyer, as by the delivery of the

[1] Thus, in Miles *v.* Gorton, 2 Cr. & M. 504, 511, *Bayley*, B., said: "The general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery or payment, although every thing may have been done so as to devest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until payment of the price." And see Parks *v.* Hall, 2 Pick. 212.

[2] This is according to the fifth rule laid down by Sergeant *Williams*, in his learned note to Pordage *v.* Cole, 1 Wms. Saund. 319.

[3] Sumner *v.* Hamlet, 12 Pick. 81; Wilson *v.* Balfour, 2 Campb. 579.

[4] Brewer *v.* Salisbury, 9 Barb. 511; Chamberlain *v.* Fair, 23 Vt. 265; Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 4 B. & P. 69; Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* The Eastern Counties Railway Co. 12 M. & W. 33; Biggs *v.* Wisking, 25 E. L. & E. 257; Mills *v.* Hunt, 20 Wend. 431; Davis *v.* Moore, 13 Maine, 424; Boynton *v.* Veazie, 24 Maine, 286. A delivery of part, however, will not devest the vendor of his lien as to the *whole*, if any thing remains to be done by the vendor to the portion undelivered. Simmons *v.* Swift, 5 B. & Cress. 857. And if the vendee obtain possession by fraud, the vendor will lose none of his rights by such a delivery. Earl of Bristol *v.* Wilsmore, 1 B. & C. 514; Hussey *v.* Thornton, 4 Mass. 405; Litterel *v.* St. John, 4 Blackf. 326.

key of a warehouse in which they are locked up.[1] Whether the delivery of an order on the warehouseman is of itself delivery, before presentation to the warehouseman, may not be certain.[2] We think however that such presentation is necessary, and that until it is made there is no complete transfer of possession.[3] If the warehouseman consented, and agreed to hold the goods as the buyer's, there could be no further question. And we think such a presentation makes a delivery whether the warehouseman gives or withholds his consent, unless he had a right to withhold it, and exercised his right.[4]

If the seller delivers the goods to the buyer, as he thereby loses his lien, he cannot afterwards, by virtue of this lien, retake the goods and hold them.[5] But if the delivery was made with an express agreement that non-payment of the price should revest

[1] Wilkes *v.* Ferris, 5 Johns. 335. A delivery of the key, the property being locked up, is so far a delivery of the goods, that it will support an action of trespass against a second purchaser from the original owner who, by borrowing the key from the shop of a third person with whom it was left, thus obtains possession of the goods. Chappel *v.* Marvin, 2 Aikens, 79.

[2] See Wilkes *v.* Ferris, 5 Johns. 335; Spear *v.* Travers, 4 Campb. 251; Lucas *v.* Dorrien, 7 Taunt. 278.

[3] Bentall *v.* Burn, 3 B. & Cr. 423; Farina *v.* Home, 16 M. & W. 119; Carter *v.* Willard, 19 Pick. 1.

[4] In Harman *v.* Anderson, 2 Campb. 243, the buyer having received a delivery order from the seller, sent it to the wharfingers, in whose possession the goods were; but they neither made any transfer in their books to the name of the buyer, nor did any thing to testify that they accepted the delivery order, or held the goods on the buyer's account. And Lord *Ellenborough* said: "After the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaser. The delivery note was sufficient, without any actual transfer being made in their books. From thenceforth they became the agents of Dudley, the bankrupt. They themselves might have a lien on the goods, and be justified in detaining them till that was satisfied; but as between vendor and vendee the delivery was complete." And see Carter *v.* Willard, 19 Pick. 1; Tuxworth *v.* Moore, ibid. 347; Tucker *v.* Ruston, 2 C. & P. 86; Lackinton *v.* Atherton, 7 M. & Gr. 360. But latterly the English courts are inclined to hold that the delivery is not complete until the warehouseman *consents* to hold the property on account of the buyer. And the rule holds equally even where the warehouseman is bound to give such consent, and will render himself liable to an action by refusing. Thus, in Bentall *v.* Burn, 3 B. & Cr. 423, where the property was in the custody of the *London* Dock Company, the Court of King's Bench said: "It has been said that the *London* Dock Company were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them." This case arose under the 17th section of the Statute of Frauds, and the question was, whether the vendee had "accepted and actually received" the goods purchased within the meaning of that section. And see Farina *v.* Home, 16 M. &. W. 119.

[5] Smith *v.* Lynes, 3 Sandf. Sup. Ct. 203. The court, in giving judgment in this case, thus remark: "Where goods are sold, to be paid for on delivery, either in cash or commercial paper, and the goods are delivered without exacting money or the securities, such delivery is absolute, and a complete title vests in the purchaser, unless the delivery was procured by fraud." See further, Carleton *v.* Sumner, 4 Pick. 516;

the property in the seller, this agreement may be valid, and the seller can reclaim the goods from the buyer if the price be not paid.[1]

If the buyer neglect or refuse to take the goods and pay the price within a reasonable time, the seller may resell them on notice to the buyer, and look to him for the deficiency by way of damages for the breach of the contract.[2] The seller, in making such resale, acts as agent or trustee for the buyer; and his proceedings will be regulated and governed by the rules usually applicable to persons acting in those capacities.[3]

Certain consequences flow from the rules and principles already stated, which should be noticed. Thus, if the party to whom the offer of sale is made, accepts the offer, but still refuses or neglects to pay the price, and there are no circumstances indicating a credit or otherwise justifying the refusal or neglect, the seller may disregard the acceptance of his offer, and consider the contract as never made, or as rescinded. It would, however, be proper and prudent on the part of the seller, expressly to demand payment of the price before he treated the sale as null; and a refusal or neglect would then give him at once a right to hold and treat the goods as his own. So, too, if the seller unreasonably neglected or refused to deliver the goods sold, and especially if he refused to deliver them, the buyer thereby acquires the right to consider that no sale was made, or that it has been avoided. But neither party is bound to exercise the right thus acquired by the refusal or neglect of the other; but may consider the sale as complete, and may sue the other for non-payment, or non-delivery.

As a sale of goods necessarily passes the property in them from the seller to the buyer, only he who has in himself the property in the goods can make a valid sale of them.[4] But a sale may be

Bowen *v.* Burke, 13 Penn. 146; Mixer *v.* Cook, 31 Maine, 340; Dresser Manuf. Co. *v.* Waterson, 3 Metc. 18; Hennequin *v.* Sands, 25 Wend. 640; Smith *v.* Dennie, 6 Pick. 266, per *Parker*, C. J.

[1] See Allen *v.* Ford, 19 Pick. 217. And see preceding note.

[2] Langfort *v.* Tiler, 1 Salk. 113; Sands *v.* Taylor, 5 Johns. 395; Crooks *v.* Moore, 1 Sandf. 297; Maclean *v.* Dunn, 4 Bing. 722. But see Graves *v.* Ashlin, 3 Campb. 426; Martindale *v.* Smith, 1 Q. B. 389.

[3] Thus, the seller must dispose of the goods, on the resale, in good faith, and in the mode best calculated to produce their value. If the usual mode of selling the particular goods in the market, be at public auction, the seller ought to dispose of them in that manner. If the custom be to sell them through a broker, it is the seller's duty to offer them in the market through a broker's agency. Crooks *v.* Moore, 1 Sandf. 297. And see Sands *v.* Taylor, 5 Johns. 395.

[4] Stanley *v.* Gaylord, 1 Cush. 536; McMahon *v.* Sloan, 12 Penn. St. 229; Everett *v.* Saltus, 15 Wend. 475; Covil *v.* Hill, 4 Denio, 323.

made by him who has the *property* in the goods, but not the *possession;* especially if they are withheld from him by a wrongdoer. By such sale there passes to the buyer not a mere right to sue the wrongdoer, but the property in the goods, with whatever rights belong to them.[1]

If the seller has merely the right of possession, as if he hired the goods, or the possession only, or as if he stole them, or found them, he cannot sell them and give good title to the buyer against the owner; and the owner may therefore recover them even from an honest purchaser, who was wholly ignorant of the defect in the title of him from whom he bought them. This follows from the rule above stated, that only he who has in himself a right of property can sell a chattel, because the sale must transfer the right of property from the seller to the buyer. In England a sale in a "market overt," passes the property in a stolen chattel to an honest purchaser. In this country we have no markets overt, and the only exception to the above rule is where money is sold or paid away, or negotiable paper transferable by delivery, which is considered as money. In either case, he who takes it in good faith, and for value, from a thief or finder, holds it by good title.[2]

The transfer of the right of property in the thing sold is so far a necessary and immediate consequence of a completed sale, and essential thereto, that where it cannot take place, or by agreement does not take place, there is no sale. Therefore, while there may be a delay agreed upon expressly or impliedly, either as to the payment of the money or the delivery of the goods, or both, and yet the sale be complete and valid, still, if when there is such delay, any thing remains to be done by the seller, to or in relation to the goods sold, for their ascertainment, identification, or completion, the property in the goods does not pass until that thing is done; and there is as yet no completed sale. Therefore, if there be a bargain for the sale of specific goods, but there remains something material which the seller is to do to them, and they are casually burnt or stolen, the loss is the seller's, because the property had not yet passed to the buyer.[3]

[1] Sarah Ann, 2 Sumner, 211; Cartland *v.* Morrison, 32 Maine, 190; Hall *v.* Robinson, 2 Comst. 293.

[2] Miller *v.* Race, 1 Burr. 452; Peacock *v.* Rhodes, 2 Doug. 633; Grant *v.* Vaughan, 3 Burr. 1516; Wheeler *v.* Guild, 20 Pick. 551.

[3] Zagury *v.* Furnell, 2 Camp. 240; Shepley *v.* Davis, 5 Taunt. 617; Wallace *v.*

So, if the goods are a part of a large quantity, they remain the seller's until selected and separated; and even after that, until recognized and accepted by the buyer, unless it is plain from words or circumstances, that the selection and separation by the buyer are intended to be conclusive upon both parties.[1]

If repairing, or measuring, or counting, must be done by the seller, before the goods are fitted for delivery, or the price can be determined, or their quantity ascertained, they remain, until this be done, the seller's. But if the seller delivers them and the buyer accepts them, and any of these acts remain to be done, these acts will not be considered as belonging to the contract of sale, for that will be regarded as completed, and the property in the goods will have passed to the buyer with the possession; and these acts will be taken only to refer to the adjustment of the final settlement as to the price.[2]

Questions of this kind have given rise to much litigation, and caused some perplexity. Whatever rule be adopted it may be sometimes difficult to apply it; but we cannot doubt that the true principle is this: Every sale transfers the property, and that is not a sale which does not transfer the property in the thing sold; but this property cannot pass, and therefore the thing is not sold, unless, first, it is completed and wholly finished so as to be in fact and in reality the thing purporting to be sold.[3] And in the second place, it must be so distinguished and discriminated

Breeds, 13 East, 522; Busk *v.* Davis, 2 M. & S. 397; Gillett *v.* Hill, 2 C. & M. 535; Rhode *v.* Thwaites, 6 B. & C. 388; Simmons *v.* Swift, 5 B. & C. 857; Tarling *v.* Baxter, 6 B. & C. 360; Alexander *v.* Gardner, 1 Bing. N. C. 676; Stone *v.* Peacock, 35 Maine, 385; Dixon *v.* Myers, 7 Grattan, 240; Crawford *v.* Smith, 7 Dana, 61; Rapelye *v.* Mackie, 6 Cowen, 250; Outwater *v.* Dodge, 7 Cowen, 85; Stevens *v.* Eno, 10 Barb, 95; Riddle *v.* Varnum, 20 Pick. 280; Golder *v.* Ogden, 15 Penn. St. 528; Lester *v.* McDowell, 18 Penn. St. 91; Messer *v.* Woodman, 2 Foster, 172; Warren *v.* Buckminster, 4 Foster, 337.

[1] Dutton *v.* Solomonson, 3 B. & P. 582; Fragano *v.* Long, 4 B. & Cr. 219; Atkinson *v.* Bell, 8 B. & Cr. 277.

[2] Cushman *v.* Holyoke, 34 Maine, 289; Macomber *v.* Parker, 13 Pick. 175, 183, per *Wilde*, J.; Scott *v.* Wells, 6 W. & S. 357, where *Gibson*, C. J., says: "A sale is imperfect, only where it is left open for the addition often necessary to complete it, or where it is deficient in some indispensable ingredient which cannot be supplied from an extrinsic source. But when possession is delivered pursuant to a contract which contains no provision for additional terms, the parties evince, in a way not to be mistaken, that they suppose the bargain to be consummated." But if it is certain that the parties intended that the sale should be complete before the article sold is weighed or measured, the property may pass before this is done, though there be no delivery. Riddle *v.* Varnum, 20 Pick. 280.

[3] Mucklow *v.* Mangles, 1 Taunt. 318; Goode *v.* Langley, 7 B. & C. 26; Atkinson *v.* Bell, 8 B. & C. 277; Elliott *v.* Pybus, 4 M. & S. 389, 10 Bing. 512; Moody *v.* Brown, 34 Maine, 109; but see Bement *v.* Smith, 15 Wend. 493.

from all other things, that it is certain, or can be made certain, what is the specific thing, the property in which is changed by the sale.[1] If the transaction is deficient in either of these two points, it is not a sale, although it may be a valid contract for a future sale of certain articles when they shall be completed, or when separated from others. And it is to be noticed that a contract for a future sale, to take place either at a future point of time, or when a certain event happens, does not, when that time arrives, or on the happening of the event, become of itself a sale, transferring the property. The party to whom the sale was to be made does not then acquire the property, and cannot by tendering the price acquire a right to possession; but he may tender the price or whatever else would be the fulfilment of his obligation, and then sue the owner for his breach of contract. But the property in the goods remains in the original owner.

For the same reason that the property in the goods must pass by a sale; there can be no actual sale of any chattel or goods which have no existence at the time. It may, as we have seen, be a good contract for a future sale, but it is not a present sale.[2] Thus, in contracts for the sale of articles yet to be manufactured, the subject of the contract not being in existence when the parties enter into their engagement, no property passes until the chattel is in a finished state, and has been specifically appropriated to the person giving the order, and approved and accepted by him.[3]

As there can be no sale unless of a specific thing, so there is no sale but for a price which is certain, or which is capable of being made certain by a distinct reference to a certain standard.[4]

[1] See *ante*, p. 48, n. (1).

[2] Smith *v.* Atkins, 18 Vt. 461; Brainard *v.* Burton, 5 Vt. 97; Strickland *v.* Turner, 14 E. L. & E. 471; Parsons *v.* Woodward, 2 N. J. 196. In this last case it was held that a contract to deliver at a certain price a quantity of trees of a specified kind to be grown after the contract, is not strictly a contract of sale, nor would it be valid as such, but it is a mere executory contract; and it does not confine the vendor to deliver any particular individual trees, or only trees raised by himself, but a tender of any trees answering the description in the contract will be sufficient.

[3] In Moody *v.* Brown, 34 Maine, 107, it was held that neither the manufacture of an article, pursuant to the order of a customer, nor the tender of the article when so manufactured, nor leaving it with the customer against his will, will transfer the title. To pass the title there must be an *acceptance*, by the customer, express or implied. And *Shepley*, C. J., said, "To effect a change in the property there must be an assent of both parties. It is admitted that the mere order given for the manufacture of the article does not affect the title. It will continue to be the property of the manufacturer until completed and tendered. There is no assent of the other party to a change of the title exhibited by a tender and refusal. There must be proof of an acceptance or of acts or words respecting it, from which an acceptance may be inferred, to pass the property."

[4] Brown *v.* Bellows, 4 Pick. 179, 189. But under some circumstances a contract of

SECTION III.

OF DELIVERY AND ITS INCIDENTS.

What is a sufficient delivery is sometimes a question of difficulty. In general, it is sufficient, if the goods are placed in the buyer's hands or his actual possession, or if that is done which is the equivalent of this transfer of possession. Some modes and instances of delivery we have already seen. We add, that if the goods are landed on a wharf alongside of the ship which brings them, with notice to the buyer or knowledge on his part, this may be a sufficient delivery, if usage, or the obvious nature of the case make it equivalent to actually giving possession. And usage is of the utmost importance in determining questions of this kind.

In general, the rule may be said to be, that that is a sufficient delivery which puts the goods within the actual reach or power of the buyer, with immediate notice to him, so that there is nothing to prevent him from taking actual possession.

When from the nature or situation of the goods, an actual delivery is difficult or impossible, as in case of a quantity of timber floating in a boom, slight acts are sufficient to constitute a delivery.[1] So if the property which is the subject of the sale is at sea, the indorsement and delivery of the bill of lading, or other muniment of title, is sufficient to constitute a delivery.[2]

sale may be complete and binding, though silent as to the price, such silence being equivalent to a stipulation for a *reasonable* price. Valpy *v.* Gibson, 4 C. B. 837, 864. In this case *Wilde*, C. J., said, "Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances. And see Acebal *v.* Levy, 10 Bing. 376; Hoadly *v.* M'Laine, id. 482; Dickson *v.* Jordan, 12 Ired. 79.

[1] Jewett *v.* Warren, 12 Mass. 300; Boynton *v.* Veazie, 24 Maine, 286; Gibson *v.* Stevens, 8 How. 384; Calkins *v.* Lockwood, 17 Conn. 154.

[2] Gardner *v.* Howland, 2 Pick. 599; Pratt *v.* Parkman, 24 id. 42; Dows *v.* Cobb, 12 Barb. 310; Brinley *v.* Spring, 7 Greenl. 241; Richardson *v.* Kimball, 28 Maine, 463. The sale of ships and merchandise at sea is governed by more liberal rules than the sale of goods and chattels on shore. By the indorsement and delivery of the bill of lading, which is the documentary evidence of title to the merchandise, the property instantly vests in the vendee, and he can transfer it to a second purchaser by another indorsement and delivery. Lickbarrow *v.* Mason, 2 T. R. 63, 6 East, 21, note, 1 Smith's Lead. Cas. 388, which gives an excellent summary of the law relating to bills of lading. See further, Walter *v.* Ross, 2 Wash. C. C. 283; Ryberg *v.* Snell, id. 403.

And in such case the seller should send or deliver the bill of lading to the buyer within a reasonable time, that he may have the means of offering the goods in the market. And it has been held that a refusal of the bill of lading, authorized the buyer to rescind the sale.[1]

Until delivery the seller is bound to keep the goods with ordinary care, and is liable for any loss or injury arising from the want of such care or of good faith.[2]

If the buyer lives at a distance from the seller, the seller must send the goods in the manner indicated by the buyer. If no directions are given, he must send them as usage, or in the absence of usage, as reasonable care would require. And generally all customary and proper precautions should be taken to prevent loss or injury in the transit.[3] If these are taken, the goods are sent at the risk of the buyer, and the seller is not responsible for any loss. But he is responsible for any loss or injury happening through the want of such care or precaution. And if he sends them by his own servant, or carries them himself, they are in his custody, and generally, at his risk, until delivery.

This question of delivery has a very great importance in another point of view; and that is, as it bears upon the honesty, and therefore the validity, of the transaction. As the owner of goods ought to have them in his possession, and as a transfer of possession usually does and always should accompany a sale, the want of this transfer is an indication, more or less strong, that the sale is not a real one, but a mere cover. The law on this subject has fluctuated considerably; and is different in differ-

[1] Barber *v.* Taylor, 5 M. & W. 533.

[2] But if the seller exercises ordinary diligence in keeping the commodity, he is not liable for its loss or depreciation, unless it arises from a defect against which he has warranted. Thus, in Lansing *v.* Turner, 2 Johns. 13, A sold to B a certain quantity of beef, B paying the purchase-money in full; and it was agreed between them that the beef should remain in the custody of A until it should be sent to another place. Sometime after, B received a part, which proved to be bad, and the whole was found, on inspection, to be unmerchantable: *Held*, that as the beef was good at the time of its sale, the vendee must bear the loss of its subsequent deterioration. See Black *v.* Webb, 20 Ohio, 304.

[3] Buckman *v.* Levi, 3 Camp. 414; Clark *v.* Hutchins, 14 East, 475. If the goods are sent by ship or otherwise, it is a part of the sellers duty to give such notice of the sending as will enable the buyer to insure or take other precautions. Cothay *v.* Tute, 3 Camp. 129; 2 Kent's Com. 500. And if it has been a former custom with the parties for the vendor to insure, he is bound to make insurance of the articles sent. Lond. Law Mag. vol. 4, p. 359; Smith *v.* Lascelles, 2 T. R. 189.

ent parts of the country. Generally, and as the prevailing rule, it may be stated thus: Delivery is nowhere essential to a sale at common law; but if there is no delivery, and a third party, without knowledge of the previous sale, purchases the same thing from the seller, he gains an equally valid title as the first buyer; and if he completes this title by acquiring the possession before the other, he can hold the property against the other.[1] So, also, unless delivery or possession accompany the transfer of the right of property, the things sold are subject to attachment by the creditors of the seller.[2] And if the sale be completed, and nevertheless no change of possession takes place, and there is no certain and adequate cause or justification of the want or delay of this change of possession, the transaction will be regarded as fraudulent and void in favor of a third party, who, either by purchase or by attachment, acquires the property in good faith, and without a knowledge of the former sale. In this country the rules of law on this point are hardly so strict as in England; and, generally, fraud would not be absolutely inferred from the want of change of possession. But this circumstance might be explained, and if shown to be perfectly consistent with honesty, and to have occurred for good reasons, and especially if the delay in taking possession was brief, the title of the first buyer would be respected.[3]

If goods are sold in a shop or store, separated, and weighed or numbered if that be necessary, and put into a parcel, or otherwise made ready for delivery to the buyer, in his presence, and he request the seller to keep the goods for a time for him, this is so far a delivery as to vest the property in the goods in the buyer, and the seller becomes the bailee of the buyer. And if the goods are lost while thus in the keeping of the seller, without his fault, it is the loss of the buyer.

In a contract of sale there is sometimes a clause providing that a mistake in description, or a deficiency in quality or quantity, shall not avoid the sale, but only give the buyer a right to

[1] Lanfear *v.* Sumner, 17 Mass. 110; Babb *v.* Clemson, 10 S. & R. 419; Fletcher *v.* Howard, 2 Aik. 115; Hoofsmith *v.* Cope, 6 Wharton, 53; Dawes *v.* Cope, 4 Binn. 258; Carter *v.* Willard, 19 Pick. 1.

[2] See cases *supra*.

[3] There is a great diversity of opinion upon this subject, but the weight of authority, both here and in England, seems to sustain the doctrine stated in the text. The question is ably discussed in 2 Kent's Com. 515, and in 1 Smith's Lead. Cas. 1. The principal authorities are fully cited in 1 Parsons on Contracts, pp. 441 and 442, and notes.

deduction or compensation. But if the mistake or defect be great and substantial, and affects materially the availability of the thing for the purpose for which it was bought, the sale is nevertheless void, for the thing sold is not that which was to have been sold.[1]

If the buyer knowingly receives goods so deficient or so different from what they should have been that he might have refused them, he will be held to have waived the objection, and to be liable for the whole price; unless he can show a good reason for not returning them, as in the case of materials innocently used before discovery of the defects or the like.[2] In that case, when the price is demanded, he may set off whatever damages he has sustained by the seller's breach of contract, and the seller shall recover only the value to the buyer of the goods sold even if that be nothing.[3] But a long delay or silence may imply a waiver of such right on the part of the buyer.

One who orders many things at one time and by one bargain, may, generally, refuse to receive a part without the rest;[4] but if he accepts any part, he severs that part from the rest, and rebuts the presumption that it was an entire contract; the buyer will then be held as having given a separate order for each thing, or part, and as therefore bound to receive such other parts as are tendered, unless some distinct reason for refusal attaches to them.[5] The law is not perhaps quite settled on this point, especially if many several things are bought at one auction, but by different bids.[6]

[1] Flight *v.* Booth, 1 Bing. N. C. 370; Duke of Norfolk *v.* Worthy, 1 Campb. 340; Leach *v.* Mullett, 3 C. & P. 115; Robinson *v.* Musgrove, 2 M. & Rob. 92, 8 C. & P. 469.

[2] As in Milner *v.* Tucker, 1 C. & P. 15, where a person contracted to supply a chandelier, sufficient to light a certain room, and the purchaser kept the article six months, and then returned it; it was held that he was liable for the price of the chandelier, although it was not according to the contract. See also Cash *v.* Giles, 3 ib. 407; Elliott *v.* Thomas, 3 M. & W. 177; Jordan *v.* Norton, 4 id. 155; Percival *v.* Blake, 2 C. & P. 514. In this case, keeping property *two* months was *held* to be an acceptance and the purchaser was bound to pay the price. See Okell *v.* Smith, 1 Starkie, 107; Groning *v.* Mendham, id. 257; Hopkins *v.* Appleby, id. 477; Goodhue *v.* Butman, 8 Greenl. 116; Kellogg *v.* Denslow, 14 Conn. 411; Poulton *v.* Lattimore, 9 B. & C. 259.

[3] Waring *v.* Mason, 18 Wend. 425; Basten *v.* Butter, 7 East, 480; Farnsworth *v.* Garrard, 1 Camp. 38; Chappel *v.* Hicks, 4 Tyrw. 43, 2 C. & M. 214; Cousins *v.* Paddon, 4 Dowl. 488.

[4] Champion *v.* Short, 1 Campb. 53; Symonds *v.* Carr, id. 361; Baldey *v.* Parker, 2 B. & C. 37.

[5] Bowker *v.* Hoyt, 18 Pick. 555; Miner *v.* Bradley, 22 Pick. 457.

[6] In the case of Roots *v.* Lord Dormer, 4 B. & Ad. 77, it is expressly decided that, where several lots are knocked down to a bidder at an auction, and his name marked

Probably, the question whether it is one contract, so that the buyer shall not be bound to receive any part unless the whole be tendered to him, would be determined by an inference from all the facts, as to whether the parts so belong together, that it may reasonably be supposed that none would have been purchased if any part could not have been.

The buyer may have, by the terms of the bargain, the right of redelivery. For sales are sometimes made, and it is agreed that the purchaser may return the goods within a fixed, or within a reasonable time. He may have this right without any condition, and then has only to exercise it at his discretion. But he may have the right to return the thing bought, only if it turns out to have, or not to have, certain qualities; or only upon the happening of a certain event. In such case the burden of proof is on him to show that the circumstances exist which are necessary to give him this right. In either case the property vests in the buyer at once, as in ordinary sales; but subject to the right of return given him by the agreement. If he does not exercise his right within the agreed time, or within a reasonable time if none be agreed upon, the right is wholly lost, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered.[1]

SECTION IV.

OF CONTRACTS VOID FOR ILLEGALITY OR FRAUD.

As the law will not compel or require any one to do that which it forbids him to do, no contract can be enforced at law which is tainted with illegality. It may, however, be necessary to consider whether the contract be entire or separable, and whether it is wholly or partially illegal. If the whole consideration, or any part of the consideration, be illegal, the promise founded

against them in the catalogue, a distinct contract arises for each lot. See also Messer *v.* Woodman, 2 Foster, 176; Van Eps *v.* Corporation of Schenectady, 12 Johns. 436; James *v.* Shore, 1 Starkie, 426; Emmerson *v.* Heelis, 2 Taunt. 38. But see *contrà*, Chambers *v.* Griffiths, 1 Esp. 150; Coffman *v.* Hampton, 2 W. & S. 377; Tompkins *v.* Haas, 2 Barr, 74.

[1] Moss *v.* Sweet, 3 E. L. & E. 311; Beverly *v.* The Lincoln Gas Light and Coke Co. 6 Ad. & El. 829; Bayley *v.* Gouldsmith, Peake, 56; Neate *v.* Ball, 2 East, 116; Dearborn *v.* Turner, 16 Maine, 17; Johnson *v.* McLane, 7 Blackf. 501.

upon it is void. If a whole promise, or any part of a promise that cannot be severed into substantial and independent parts, is illegal, the whole promise is void. But if the consideration is legal, and the promise is legal in part and illegal in part, and that part of the promise which is legal can be severed from that part which is illegal, and there be a substantial promise having a value of its own, this legal part can be enforced.[1] For further remarks upon this subject, however, we refer to the previous chapter on consideration.

Formerly, an agreement to sell at a future day goods which the promisor had not now, and had not contracted to buy, and had no notice or expectation of receiving by consignment, was considered open to the objection that it was merely a wager, and therefore void.[2] But later cases have admitted it to be a valid contract.[3]

We have already said, in our second chapter, that fraud vitiates and avoids every contract and every transaction. Hence, a wilfully false representation by which a sale is affected;[4] or a purchase of goods with the design of not paying for them;[5] or

[1] See 2 Parsons on Con. 252, note, where the leading authorities for this well-settled principle are collected.

[2] This was the opinion of Lord Tenterden. See Bryan *v.* Lewis, Ry. & M. 386 Lorymer *v.* Smith, 1 B. & C. 1.

[3] See Hibblewhite *v.* McMorine, 5 M. & W. 462. In this case *Parke*, B., in delivering the judgment of the court, said, "I have always entertained considerable doubt and suspicion as to the correctness of Lord *Tenterden's* doctrine in Bryan *v.* Lewis; it excited a good deal of surprise in my mind at the time; and when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no tendency to injure third parties. The *dictum* of Lord *Tenterden* certainly was not a hasty observation thrown out by him, because it appears from the case of Lorymer *v.* Smith, that he had entertained and expressed similar notions four years before. He did not, indeed, in that case, say that such a contract was void, but only that it was of a kind not to be encouraged; and the strong opinion he afterwards expressed appears to have gradually formed in his mind during the interval, and was no doubt confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time. There is no indication in any of the books of such a doctrine having ever been promulgated from the bench, until the case of Lorymer *v.* Smith, in the year 1822, and there is no case which has been since decided on that authority. Not only, then, was the doubt expressed by *Bosanquet*, J., in Wells *v.* Porter, well founded, but the doctrine is clearly contrary to law." And see Wells *v.* Porter, 2 Bing. N. C. 722; Stanton *v.* Small, 3 Sandf. 230.

[4] Frost *v.* Lowry, 15 Ohio, 200; Cross *v.* Peters, 1 Greenl. 376; Herrick *v.* Kingsley, 3 Fairf. 278. If the vendor make such material misrepresentations of matters of fact, as essentially affect the interests of the other party, who is thereby deceived, the sale may be repudiated. Doggett *v.* Emerson, 3 Story, 700, 733; Daniel *v.* Mitchell, 1 Story 172; Hammatt *v.* Emerson, 27 Maine, 308.

[5] See 2 Parsons on Con. 269, 270.

hindering others from bidding at auction by wrongful means; or selling "with all faults" and then purposely concealing and disguising them;[1] and any similar act will avoid a sale. No title passes to the buyer by such sale, which he can himself maintain, even if there be a delivery to him. But, by an exception to the general rule that he who has no title can give none, if such fraudulent buyer sells to a third party who is wholly without participation in or knowledge of the fraud, such innocent buyer may acquire a good title.[2]

A buyer who is imposed upon by a fraud, and therefore has a right to annul the sale, must exercise this right as soon as may be after discovering the fraud. He does not lose the right necessarily by any delay, but certainly does by any unexcused delay.[3]

A seller may rescind and annul a sale if he were induced to make it by fraud. But he may waive the right and sue for the price. If, however, the fraudulent buyer gets the goods on a credit, and the seller sues for the price, this suit is a confirmation of the whole sale including the credit, or rather it is an entire waiver of his right to annul the sale, and the suit cannot be maintained until the credit has wholly expired.[4]

If a party who has been defrauded by any contract, brings an action to enforce it, this is a waiver of his right to rescind, and a confirmation of the contract.[5] Or if with knowledge of the fraud, he offers to perform the contract on conditions which he had no right to exact, this has been held so effectual a waiver of the fraud that he cannot set it up in defence if sued on the contract.[6]

[1] Baglehole *v.* Walters, 3 Campb. 154.
[2] Load *v.* Green, 15 M. & W. 216; White *v.* Garden, 10 C. B. 919; Powell *v.* Hoyland, 6 Exch. 67; Stevenson *v.* Newnham, 16 E. L. & E. 401; Hoffman *v.* Noble, 6 Met. 68.
[3] See Masson *v.* Bovet, 1 Denio, 69; Selway *v.* Fogg, 5 M. & W. 83; Saratoga R. R. *v.* Row, 24 Wend. 74.
[4] Ferguson *v.* Carrington, 9 B. & Cr. 59.
[5] Ferguson *v.* Carrington, 9 B. & Cr. 59; Kimball *v.* Cunningham, 4 Mass. 502.
[6] Blydenburg *v.* Welsh, Baldwin, 331.

SECTION V.

OF SALES WITH WARRANTY.

A sale may be with warranty; and this may be general, or particular and limited. A general warranty does not extend to defects which are known to the purchaser; or which are open to inspection and observation, unless the purchaser is at the time unable to discover them readily, and relies rather upon the knowledge and warranty of the seller.[1] A warranty may also be either express or implied. It is *not* implied by the law generally merely from a full, or as it is said, a sound price. The rule, *caveat emptor*, prevents this.[2] But the usage of the trade will be considered, and if that require a declaration of certain defects whenever they exist, the absence of such declaration is a warranty against such defects.[3] Mere declarations of opinion are not a warranty;[4] but if they are intended to deceive and have that effect, they may avoid the sale for fraud.[5] And affirmations of quantity or quality, which are made pending the negotiations for sale, with a view to procure a sale, and having that effect, will be regarded as a warranty.[6] Goods sold by sample are warranted to conform

[1] See 1 Parsons on Cont. 459, n. (*i*).

[2] Mixer *v.* Coburn, 11 Met. 559; Winsor *v.* Lombard, 18 Pick. 59; Parkinson *v.* Lee, 2 East, 321; Stuart *v.* Wilkins, Dougl. 20; Johnston *v.* Cope, 3 H. & Johns. 89; Seixas *v.* Woods, 2 Caines, 48; Holden *v.* Dakin, 4 Johns. 421; Moses *v.* Mead, 1 Denio, 378. But in Louisiana, where the civil law prevails, and in South Carolina, it is held that the sale of a chattel for a sound price creates a warranty against all faults known or unknown to the seller. Timrod *v.* Shoolbred, 1 Bay, 324; State *v.* Gaillard, 2 id. 19; Dewees *v.* Morgan, 1 Martin, 1; Melançon *v.* Robichaux, 17 Louis. 97; Barnard *v.* Yates, 1 N. & McC. 142; Missroon *v.* Waldo, 2 id. 76.

[3] See Jones *v.* Bowden, 4 Taunt. 847.

[4] Thus, in Arnott *v.* Hughes, Chitty on Con. 393, n., an action was brought on a warranty that certain goods were fit for the China market. The plaintiff produced a letter from the defendant, saying that he had goods fit for the China market, which he offered to sell cheap. Lord *Ellenborough held* that such a letter was not a warranty, but merely an invitation to trade, it not having any specific reference to the goods actually bought by the plaintiff. And see 1 Parsons on Cont. 463, n. (*o*).

[5] Matthews *v.* Bliss, 22 Pick. 48; Doggett *v.* Emerson, 3 Story, 700; Hough *v.* Richardson, id. 659; Daniel *v.* Mitchell, 1 id. 172; Small *v.* Attwood, 1 Younge, 407; Warner *v.* Daniels, 1 W. & M. 90.

[6] Thus, in Carley *v.* Wilkins, 6 Barb. 557, it was held that a representation made by a vendor, upon a sale of flour in barrels, that it was in quality superfine or extra superfine, and worth a shilling a barrel more than common, coupled with the assurance to the buyer's agent that he might rely upon such representation, was a warranty of the quality of the flour. So in Cave *v.* Coleman, 3 M. & R. 2, where upon the sale of a horse the vendor said to the vendee, "You may depend upon it, the horse is perfectly quiet and free from vice;" this was held to amount to an express warranty. And see 1 Parsons on Cont. 463, n. (*o*).

to the sample;[1] but there is no warranty that the sample is what it appears to be.[2]

It seems, according to the weight of authority, that a breach of warranty does not generally authorize the buyer to return the article sold, unless there be an agreement to that effect, or fraud.[3] But if one orders a thing for a special purpose known to the seller, he may certainly return it if unfit for that purpose, if he does so as soon as he ascertains its unfitness.[4]

In this country, the seller of goods actually in his possession is generally held to warrant his own title by the fact of the sale. This we consider now to be quite well established, although it has been doubted.[5] But if the property be not in the possession

[1] Bradford *v.* Manly, 13 Mass. 139; Oneida Man. Co. *v.* Lawrence, 4 Cow. 440; Andrews *v.* Kneeland, 6 Cow. 354; Gallagher *v.* Waring, 9 Wend. 20; Webb *v.* Roberts, 11 Wend. 422; Boorman *v.* Jenkins, 12 Wend. 566; Moses *v.* Mead, 1 Denio, 386; Hargous *v.* Stone, 1 Seld. 73; Beirne *v.* Dord, id. 95, 2 Sandf. 89. In this last case it was *held* that the mere circumstance that the seller of goods exhibits a sample at the time of the sale, will not of itself make it a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature or quality of the goods. To have this effect, the evidence must show that the parties mutually understood that they were dealing with the sample, upon an agreement on the part of the seller that the bulk of the commodity corresponded with the sample.

[2] Parkinson *v.* Lee, 2 East, 314, is the leading case upon this point. That was a case of a sale of five pockets of hops, with express warranty that the bulk answered the samples by which they were sold. The sale was in January, 1800; at that time the samples fairly answered to the commodity in bulk, and no defect was at that time perceptible to the buyer. In July following, every pocket was found to have become unmerchantable and spoiled, by heating, caused probably by the hops having been fraudulently watered by the grower, or some other person, before they were purchased by the defendant. The defendant knew nothing of this fact at the time of sale, and it was then impossible to detect it. It was *held* that there was here no implied warranty that the bulk of the commodity was merchantable at the time of sale, although a merchantable price was given.

[3] Thornton *v.* Wynn, 12 Wheat. 183; Voorhees *v.* Earl, 2 Hill, 288; Cary *v.* Gruman, 4 Hill, 625; Kase *v.* John, 10 Watts, 107; Street *v.* Blay, 2 B. & Ad. 456; Gompertz *v.* Denton, 1 Cr. & M. 207; Parson *v.* Sexton, 4 C. B. 899; Ollivant *v.* Bayley, 5 Q. B. 288; Dawson *v.* Collis, 4 E. L. & Eq. 338. But see Taymon *v.* Mitchell, 1 Md. Ch. Decis. 496.

[4] In Street *v.* Blay, 2 B. & Ad. 456, Lord *Tenterden* said: "Although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial. Okell *v.* Smith, 1 Stark. 107; nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison." And see cases in preceding note.

[5] McCoy *v.* Artcher, 3 Barb. 323; Dresser *v.* Ainsworth, 9 id. 619; Edick *v.* Crim, 10 id. 445; Huntingdon *v.* Hall, 36 Maine, 501; Coolidge *v.* Brigham, 1 Met. 551. In this last case, *Wild*, J., says: "In contracts of sales, a warranty of title is implied. The vendor is always understood to affirm that the property he sells is his own. And

of the vendor, and there be no assertion of ownership by him, no implied warranty of title arises.[1]

If a thing is ordered of a manufacturer for a special purpose, and is supplied, there is an implied warranty that it is fit for that purpose.[2] But this principle must not be applied to those cases where an ascertained article is purchased, although it be intended for a special purpose. For if the thing itself is specifically selected and purchased, the purchaser takes upon himself the risk of its effecting its purpose.[3]

this implied affirmation renders him responsible, if the title proves defective. This responsibility the vendor incurs, although the sale may be made in good faith, and in ignorance of the defect of his title. This rule of law is well established, and does not trench unreasonably upon the rule of the common law, *caveat emptor*." And see 1 Parsons on Cont. pp. 457, 458.

[1] See authorities in preceding note.

[2] Brown *v.* Edgington, 2 M. & Gr. 279. In this case the defendant was a dealer in ropes, and represented himself to be a manufacturer of the article. The plaintiff, a wine merchant, applied to him for a crane rope. The defendant's foreman went to the plaintiff's premises, in order to ascertain the dimensions and kind of rope required. He examined the crane and the old rope, and took the necessary admeasurements, and was told that the new rope was wanted for the purpose of raising pipes of wine out of the cellar, and letting them down into the street; when he informed the plaintiff that a rope must be made on purpose. The defendant did not make the rope himself, but sent the order to his manufacturer, who employed a third person to make it. It was *held* that, as between the parties to the sale, the defendant was to be considered as the manufacturer, and that there was an implied warranty that the rope was a fit and proper one for the purpose for which it was ordered. And *Tindal*, C. J., said: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed." And see 1 Parsons on Cont. 468, n. (*v*).

[3] Thus, in Keates *v.* Kadogan, 2 E. L. & Eq. 320, *Maule*, J., says: "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable." And see Chanter *v.* Hopkins, 4 M. & W. 399; Bluett *v.* Osborne, 1 Stark. 384; Gray *v.* Cox, 4 B. & Cr. 108; Dickson *v.* Jordan, 11 Ired. 166.

CHAPTER V.

STOPPAGE IN TRANSITU.

A SELLER, who has sent goods to a buyer at a distance, and after sending them finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this, is called the right of Stoppage in Transitu.

The right exists only between a buyer and a seller. A surety for the price of the goods, bound to pay for them if the buyer does not, has not this right.[1] But one who is *substantially* a seller, has; thus one ordered by a foreign correspondent to buy goods for him, and then buying them in his own name and on his own credit and sending them as ordered, may stop them in transitu.[2] So may a principal who sends goods to his factor,[3] or one who remits money for any particular purpose.[4] The fact that the accounts are unsettled between the parties, and the balance uncertain, does not defeat the right;[5] nor does the reception and negotiation of a bill for the goods,[6] or actual part payment.[7] But if the goods are sent to pay a precedent and existing debt they are not subject to this right.[8]

The right exists only upon actual insolvency; but this need not be formal insolvency, or bankruptcy at law; an actual ina-

[1] Siffken *v.* Wray, 6 East, 371.
[2] Feise *v.* Wray, 3 East, 93.
[3] Kinloch *v.* Craig, 3 T. R. 119.
[4] Smith *v.* Bowles, 2 Esp. 578.
[5] Wood *v.* Jones, 7 D. & R. 126. In this case a merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold or the proceeds ascertained, the latter shipped three cargoes of timber to the former, to credit in his account. Two of them arrived. Against the third the consignor drew a bill for the amount, whilst it was *in transitu*. In the interval the consignee dishonored the bill and became insolvent! — *Held*, that the consignor had a perfect right of stoppage in transitu, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted.
[6] And this is true although the bills are not yet mature. Newhall *v.* Vargas, 13 Maine, 93; Bell *v.* Moss, 5 Whart. 189; Feise *v.* Wray, 3 East, 93; Jenkyns *v.* Usborne, 7 M. & Gr. 678, 698; Donath *v.* Broomhead, 7 Penn. St. 301. And it is said that the vendor need not tender back the bill. Edwards *v.* Brewer, 2 M. & W. 375; Hays *v.* Mouille, 14 Penn. St. 48.
[7] Hodgson *v.* Loy, 7 T. R. 440; Newhall *v.* Vargas, 13 Maine, 93.
[8] Smith *v.* Bowles, 2 Esp. 578; Vertue *v.* Jewell, 4 Campb. 31; Clark *v.* Mauran, 3 Paige, 373.

bility to pay one's debts in the usual way being enough.[1] If the seller, in good faith, stops the goods, in a belief of the buyer's insolvency, the buyer may at once defeat this stoppage and restore the sale, by payment of the price. So he may, we think, by a tender of adequate security if the sale be on credit. And if the sale be on a credit without security, by agreement, then the seller can stop the goods and demand security, only for actual and sufficient cause, and takes this risk on himself. We consider these rules derivable from the general principles of the law of stoppage in transitu, but are not aware that precisely these questions have come before the courts.

The stoppage must be effected by the seller, and evidenced by some act; but it is not necessary that he should take actual possession of the goods.[2] If he gives a distinct notice to the party in possession, whether carrier, warehouseman, middleman, or whoever else, before the goods reach the buyer, this is enough.[3] They can be stopped, however, only while *in transitu;* and they are in transit until they come into the possession of the buyer. But this possession need not be actual,— a constructive possession by the buyer being sufficient.[4] But the entry of the goods at the

[1] Thompson *v.* Thompson, 4 Cush. 127, 134; Rogers *v.* Thomas, 20 Conn. 53. In this last case the point is critically examined.

[2] Litt *v.* Cowley, 7 Taunt. 169; Holst *v.* Pownal, 1 Esp. 240; Newhall *v.* Vargas, 13 Maine, 93.

[3] As to what will be a sufficient notice, see 1 Parsons on Con. 477, n. (*l*). In Whitehead *v.* Anderson, 9 M. & W. 518, it was held that a notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time, and under such circumstances, as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee. Therefore, where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, a notice of stoppage given to the ship-owner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor, — was held not to be a sufficient notice of stoppage *in transitu*.

[4] Sawyer *v.* Joslin, 20 Vt. 172. In this case goods were shipped at Troy, N. Y., directed to the purchaser at Vergennes, Vt. They were landed upon the wharf at Vergennes, half a mile from the purchaser's place of business. The purchaser's goods were usually landed at the same place, and it was not customary for the wharfinger, or the carrier, or any one for them, to have any care of the goods after they were landed; but the consignee was accustomed to transport the goods from the wharf to his place of business; as was also the custom with other persons having goods landed there. The goods, while on the wharf, were not subject to any lien for freight or charges. It was held that a delivery on the wharf was a constructive delivery to the vendee, and that the right of stoppage was gone when the goods were landed. The cases on this point were thus classified by *Hall*, J., who delivered the opinion of the court: "The cases cited and relied upon by the plaintiff's counsel, where the transit was held not to have terminated, will, I think, all be found to fall within one or the other of the following classes: 1. Cases in which it has been held that the right of stoppage existed,

custom-house, without payment of duties, does not terminate the transit.[1] If the goods are marked by the buyer and resold, this may defeat the right of the seller to stop the goods.[2] If he has received the key of the warehouse where they are stored;[3] or demanded and marked them at the inn where they had arrived on the termination of the voyage or journey, either of these things being done by the buyer personally or by his agent;[4] or if the carrier still holds goods but only as the agent of the buyer; in all these cases the transit is ended.[5] But if the carrier holds them by a lien for his charges against the buyer, the seller may pay these charges and discharge the lien, and then stop the goods in transitu.[6] And the master of a ship, which the buyer hires or owns, may be a carrier in whose hands the seller may stop the goods, if they are to be delivered finally to the buyer himself; but if they have been put on board the buyer's ship, to be transported not to him, but by his order to another place, they are so far in his possession, as soon as on board, that there can be no stoppage in transitu.[7]

where the goods were originally forwarded on board of a ship chartered by the vendee. 2. Where the delivery of the goods to the vendee has been deemed incomplete, by reason of his refusal to accept them. 3. Where goods remained in the custom-house, subject to a government bill for duties. 4. Where they were still in the hands of the carrier, or wharfinger, as his agent, subject to the carrier's lien for freights. 5. Where the goods, though arrived at their port of delivery, were still on shipboard, or in the hands of the ship's lighterman, to be conveyed to the wharf. 6. Where the goods had performed part of their transit, but were in the hands of a middleman, to be forwarded on by other carriers."

[1] Mottram *v.* Heyer, 1 Denio, 483, 5 id. 629.

[2] Stoveld *v.* Hughes, 14 East, 308.

[3] Wilkes *v.* Ferris, 5 John. 335; Chappel *v.* Marvin, 2 Aik. 79; Ellis *v.* Hunt, 3 T. R. 468.

[4] Ellis *v.* Hunt, 3 T. R. 468.

[5] Thus, in Allan *v.* Gripper, 2 Cr. & Jer. 218, where goods were conveyed by a carrier by water, and deposited in the carrier's warehouse, to be delivered thence to the purchaser or his customers, as they should be wanted, in pursuance of an agreement to this effect between the carrier and the purchaser; and this was the usual course of business between them; it was held that the carrier became the warehouseman of the purchaser, upon the goods being deposited there, and that the vendor's right of stoppage was gone.

[6] Oppenheim *v.* Russell, 3 B. & P. 42.

[7] This distinction was established in Stubbs *v.* Lund, 7 Mass. 453. There the vendors resided in Liverpool, England, and the vendees in America. The goods were delivered on board the vendees' own ship at Liverpool, and consigned to them or assigns, for which the master had signed bills of lading. The vendors, hearing of the insolvency of the vendees before the vessel left Liverpool, refused to let the vessel sail, claiming a right to stop the goods, and that they had not reached their destination. The right of stoppage was allowed, mainly, it seems, on the ground that the goods were by the bills of lading, to be transported *to the vendees*, and were in transit until they reached them; but it was thought that if the goods had been intended for some *foreign* market, and never designed to reach the possession of the purchasers, any more than they then had at the time of their shipment, the case would be different, and the

If the buyer has, in good faith and for value, sold the goods, and indorsed and delivered the bill of lading, this second purchaser holds the goods free from the first seller's right to stop them.[1] But if the goods and bill are transferred only as security for a debt due from the first purchaser to the transferee, the original seller may stop the goods, and hold them subject to this security, and need pay only the specific advances made on their credit or on that very bill of lading, and not a general indebtedness of the first purchaser to the second.[2]

The question has been much agitated whether the right of stoppage in transitu was a right to rescind the sale for non-payment, or only an extension of the common law lien of the buyer on the thing sold for his price. And it seems now quite well settled, both in England and in this country, that it is the latter; that is, an extension of the lien.[3] Important consequences might flow from this distinction. If the seller, by stopping the goods in transitu, rescinds the sale, he has no further claim for the price, nor any part of it; nor can the buyer, or any one representing him, pay the price and recover the goods against the will of the seller. If, however, he only exercises his right of lien, he holds the goods as the *property* of the buyer; and they may be redeemed by him or his representatives, by paying the price for which they are a security; and if not redeemed, they become absolutely the seller's, in the same way as a pledge might become his; and if he fails to obtain from them the full price due, he has a claim for the balance upon the buyer. All of this is not positively determined by adjudication, but it would seem to be

transit in such a case would be considered as ended. *Parsons*, C. J., said: "In our opinion the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment, (3 East, 381); but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed; because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment." See 1 Parsons on Con. p. 485, n. (*o*), and p. 486, n. (*t*).

[1] Lickbarrow *v.* Mason, 2 T. R. 63, 1 H. Bl. 357, 6 East, 21, n.

[2] *In re* Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Beav. 376.

[3] See Wentworth *v.* Outhwaite, 10 M. & W. 436; Bloxam *v.* Sanders, 4 B. & C. 941; Jordan *v.* James, 5 Hamm. 88; Rowley *v.* Bigelow, 12 Pick. 307; Newhall *v.* Vargas, 13 Maine, 93, 15 id. 315; Rogers *v.* Thomas, 20 Conn. 53; Gwynne, *Ex parte*, 12 Ves. 379; Martindale *v.* Smith, 1 Q. B. 389.

deducible from the principle that the act of stoppage in transitu is only the exercise of a lien on the goods for their price.

The exercise of this right is necessarily adverse to the buyer; for if the goods are taken by the seller, by agreement with the buyer, it is no longer a stoppage in transitu.[1] An honest buyer, apprehending bankruptcy, might wish to return the goods to their original owner; and this he could undoubtedly do if they have not become distinctly his property, and the seller his creditor for the price. But if they have, the buyer has no more right to benefit this creditor by such an appropriation of these goods, than any other creditor by giving him any other goods.[2]

It has been questioned whether, when goods sold are sent by the seller to the buyer by any regular and usual conveyance, the vendee may go forward to meet them, and take possession of them before the time of their regular delivery, and thus abridge, by his own act, the right of stoppage of the seller. But it seems that he may do this, and that the right of stoppage in transitu is terminated by the buyer's thus taking possession of the goods.[3]

[1] Ash *v.* Putnam, 1 Hill, 302; Naylor *v.* Dennie, 8 Pick. 198.
[2] See Smith *v.* Field, 5 T. R. 402; Salte *v.* Field, id. 211; Atkin *v.* Barwick, 1 Strange, 165; 1 Parsons on Con. 490, n. (*b*).
[3] See Whitehead *v.* Anderson, 9 M. & W. 518. But see Blackburn on Contract of Sale, 254, *et seq.*

CHAPTER VI.

OF GUARANTY.

A GUARANTOR is one who is bound to another for the fulfilment of a promise, or of an engagement, by a third party. This kind of contract is very common. Generally, it is not negotiable; that is, not transferable so as to be enforced by the transferee in his own name.[1] But no special form or words are necessary to the contract of guaranty; and if the word "guarantee" be used, and the whole instrument contains all the characteristics of a note of hand, payable to order or bearer, then it is negotiable.[2]

The guaranty may be enforced, although the original debt cannot; as, for example, the guaranty of the promise of a wife[3] or an infant;[4] and sometimes the guaranty of a debt is requested and given for the very reason that the debt is not enforceable at law. But generally, the liability of the principal measures and limits the liability of the guarantor. And if the creditor agree that the principal debt shall be reduced or lessened in a certain proportion, the guaranty is reduced in an equal proportion, especially if the guarantor be a party to the arrangement.[5]

A contract of guaranty is construed somewhat strictly. Thus, a guaranty of the notes of one, does not extend to notes which he gives jointly with another.[6]

A guarantor who pays the debt of the principal, may demand from his creditor the securities he holds,[7] although not, perhaps,

[1] True *v.* Fuller, 21 Pick. 140; Taylor *v.* Binney, 7 Mass. 479; Lamourieux *v.* Hewit, 5 Wend. 307; Springer *v.* Hutchinson, 19 Maine, 359; M'Doal *v.* Yeomans, 8 Watts, 361; Upham *v.* Prince, 12 Mass. 14; Miller *v.* Gaston, 2 Hill, 188; Watson *v.* McLaren, 19 Wend. 557.

[2] Ketchell *v.* Burns, 24 Wend. 456. In this case, the instrument was as follows: "For and in consideration of thirty-one dollars and fifty cents received of B. F. Spencer, I hereby guarantee the payment and collection of the within note to him or *bearer*. Auburn, Sept. 25, 1837. (Signed) Thomas Burns." And it was *held* negotiable.

[3] See Maggs *v.* Ames, 4 Bing. 470; Connerat *v.* Goldsmith, 6 Geo. 14.

[4] See Conn *v.* Coburn, 7 N. H. 368.

[5] Bardwell *v.* Lydall, 7 Bing. 489.

[6] Russell *v.* Perkins, 1 Mason, 368.

[7] Craythorne *v.* Swinburne, 14 Ves. 160; Parsons *v.* Briddock, 2 Vern. 608; Wright *v.* Morley, 11 Ves. 12; Copis *v.* Middleton, T. & R. 224; Hodgson *v.* Shaw, 3 My. & K. 183; Yonge *v.* Reynell, 15 Eng. Law and Eq. 237; Mathews *v.* Aikin, 1 Comst. 595.

an assignment of the debt itself, or of the note or bond which declares the debt, for that is paid and discharged.[1] And in equity, the creditor will be restrained from resorting to the guarantor, until he has collected as much as he can from these securities.[2]

Unless the guaranty is by a sealed instrument, there must be a consideration to support it.[3] If the original debt or obligation rest upon a good consideration, this will support the promise of guaranty, if this promise be simultaneous with or prior to the original debt.[4] But if that debt or obligation be first incurred and completed, there must be a new consideration for the promise to guarantee that debt.[5] But it need not pass from him who receives the guaranty to him who gives it. Any benefit to him for whom the guaranty is given, or any injury to him who receives it, is a sufficient consideration if the guaranty be given because of it.[6]

In general, if there be a new and independent consideration for the guaranty, passing between the parties to it, this will make it an original promise, and not a promise to pay the debt of another; and will therefore protect it from the Statute of Frauds. But of this we shall speak particularly in the chapter on that statute.

A guaranty is not binding unless it is accepted, and unless the guarantor has knowledge of this.[7] But the law presumes this acceptance in general, when the giving of the guaranty and an action on the faith of it, by the party to whom it is given, are simultaneous.[8] In New York, wherever the guaranty is abso-

[1] Copis *v.* Middleton, Turn. & R. 224; Hodgson *v.* Shaw, 3 My. & K. 183. But see, *contrà*, Goodyear *v.* Watson, 14 Barb. 481.

[2] Cottin *v.* Blane, 2 Anst. 544; Wright *v.* Nutt, 3 Bro. C. C. 326, 1 H. Bl. 136; Wright *v.* Simpson, 6 Ves. 728.

[3] Wain *v.* Warlters, 5 East, 10; Elliott *v.* Giese, 7 Har. & J. 457; Leonard *v.* Vredenburgh, 8 Johns. 29; Cobb *v.* Page, 17 Penn. St. 469.

[4] Bainbridge *v.* Wade, 1 E. L. & Eq. 236; Campbell *v.* Knapp, 15 Penn. St. 27; Klein *v.* Currier, 14 Ill. 237; Bickford *v.* Gibbs, 8 Cush. 156; Leonard *v.* Vredenburgh, 8 Johns. 29; Graham *v.* O'Niel, 2 Hall, 474.

[5] Bell *v.* Welch, 9 C. B. 154; Pike *v.* Irwin, 1 Sandf. 14; Ware *v.* Adams, 24 Maine, 177; Parker *v.* Barker, 2 Met. 423.

[6] Morley *v.* Boothby, 3 Bing. 113, *Best*, C. J.; Leonard *v.* Vredenburgh, 8 Johns. 29.

[7] Gaunt *v.* Hill, 1 Stark. 10; M'Iver *v.* Richardson, 1 M. & S. 557.

[8] Wildes *v.* Savage, 1 Story, 22; Bleeker *v.* Hyde, 3 McLean, 279; New Haven County Bank *v.* Mitchell, 15 Conn. 206. In this last case, A executed a writing, whereby he agreed with B, for value received, that he, A, would at all times hold himself responsible to B. to a limited amount, for such paper as might be indorsed by C, and holden by B, within the amount specified. The writing was simultaneously deliv-

lute, notice of its acceptance is unnecessary, unless expressly required.[1] But, generally, an offer to guaranty a future operation, especially if by letter, does not bind the offerer, unless he has such notice of the acceptance of his offer as would give him a reasonable opportunity of indemnifying himself.[2]

If the liability of the principal be materially varied by the act of the party guaranteed, without the consent of the guarantor, the guarantor is discharged.[3] So is he, by the weight of authority, if the liability or obligation be renewed or extended by law. As if a bank, incorporated for twenty years, be renewed for ten more, and the officers and business of the bank go on without change; the original sureties of the cashier are not held beyond

ered by A and accepted by B; and B, on the credit thereof, discounted paper indorsed by C. *Held*, that no other acceptance by B, or notice thereof to A, was necessary to perfect the obligation of A.

[1] Douglass *v.* Howland, 24 Wend. 35; Smith *v.* Dann, 6 Hill, 543; Union Bank *v.* Coster, 3 Comst. 203. In this last case, *Pratt*, J., in delivering the judgment of the Court of Appeals, said: "We must hold the law to be settled in this State that where the guaranty is absolute, no notice of acceptance is necessary."

[2] Lee *v.* Dick, 10 Pet. 482; Adams *v.* Jones, 12 Pet. 207; Kay *v.* Allen, 9 Barr, 320; Mussey *v.* Rayner, 22 Pick. 223; Howe *v.* Nickels, 22 Maine, 175; Lowry *v.* Adams, 22 Vt. 169.

[3] United States *v.* Tillotson, Paine, 305; United States *v.* Hillegas, 3 Wash. C. C. 70; Postmaster-General *v.* Reeder, 4 id. 678. In Miller *v.* Stewart, 9 Wheat. 680, a bond was given conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the surety. The court *held* that the surety was discharged from his responsibility for moneys subsequently collected by his principal. Again, in the case of Bonar *v.* MacDonald, 1 E. L. & Eq. 1, in the House of Lords, on appeal from Scotland, the facts were that, in a bond by cautioners (sureties) for the careful attention to business and the faithful discharge of the duties of an agent of a bank, it was provided "that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent of any individual or copartnery in any manner or way whatsoever, nor be security for any individual or copartnery in any manner or way whatsoever." The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, he undertaking to bear one fourth part of all losses which might be incurred by his discounts. *Held*, affirming the decision of a majority of the court below, that this was such an alteration of the contract, and of the liability of the agent, that the sureties were discharged, notwithstanding that the loss arose, not from discounts, but from improper conduct of the agent. And Lord *Cottenham*, in a written opinion which was read by Lord *Brougham*, said: "The rule, as extracted from the English authorities, Evans *v.* Whyle, 5 Bing. 485; Eyre *v.* Bartrop, 3 Mad. 221; Archer *v.* Hale, 4 Bing. 464; Whitcher *v.* Hall, 5 B. & Cr. 269, is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, and, though the original agreement may, notwithstanding such variation, be substantially performed, will discharge the surety; and as to Scotland, in Bell's Principles, 71, the rule is laid down, that the cautioner is freed by any essential change consented to by the creditor in the principal obligation or transaction, without the knowledge or assent of the cautioner, which is supported by the authorities referred to." And see Farmers and Mechanics' Bank *v.* Kercheval, 2 Mich. 504.

the first term.[1] So a guaranty to a partnership is extinguished by a change among the members, although neither the name nor the business of the firm be changed.[2] But a guaranty, by express terms, may be made to continue over most changes of this kind.[3]

A specific guaranty, for one transaction, is not revocable. If it be a continuing or a general guaranty, it is revocable, unless an express agreement, founded on consideration, makes it otherwise.[4]

A creditor may give his debtor some accommodation or indul-

[1] Union Bank *v.* Ridgely, 1 Har. & Gill, 324. This was an action against the sureties of a cashier for the faithful performance of his duties. The charter of the bank expired, and was extended by a new act of the legislature. The alleged default of the cashier occurred after the reënactment of the charter. The court *held* that, where an act of incorporation, under which a bond was taken to secure the good conduct of one of the officers of the corporation, was limited in its duration to a certain period, the bond must have the same limitation; because, the parties looking to that act, it would seem to be very clear that no responsibility was contemplated beyond the period of its specified existence. The extension of the charter beyond the period of its first limitation, by legislative authority, does not enter into the contract, and cannot enlarge it. And see Bamford *v.* Iles, 3 Exch. 380. But, in the case of Exeter Bank *v.* Rogers, 7 N. H. 21, the court took a different view of this question. It appeared that Exeter Bank was incorporated by an act of the legislature, in 1803, to continue for the term of twenty years, from January 1, 1804. In 1822, an additional act of the legislature was passed, providing that the first act should remain and continue in force for a further term of twenty years, from January 1, 1824. The defendant, Rogers, was appointed cashier of the bank in 1809, gave bond with sureties for the faithful discharge of the duties of the office, and continued cashier until 1830. It was held that the bond covered all the time that Rogers remained in office.

[2] Bellairs *v.* Ebsworth, 3 Campb. 52; Russell *v.* Perkins, 1 Mason, 368; Weston *v.* Barton, 4 Taunt. 673. In this last case, it was held that a bond conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. *Mansfield*, C. J., said: "The question here is, where the original partnership being at an end, in consequence of the death of Golding, the bond is still in force as security to the surviving four; or whether, that political personage, as it may be called, consisting of five, being dead, the bond is not at an end. . . . . From almost all the cases, in truth we may say from all, (for, though there is one adverse case of Barclay *v.* Lucas, the propriety of that decision has been very much questioned,) it results that, where one of the obligees dies, the security is at an end. It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction; it is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things, there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be that the partner dying, or going out, may be the very person on whom the sureties relied; it would, therefore, be very unreasonable to hold the surety to his contract, after such change. As to the case of Barclay *v.* Lucas, 3 Doug. 321, 1 T. R. 291, n. (*a*,) cited by his lordship in the preceding extract, see 1 Parsons on Con. 507, n. (*m.*) See further, Bodenham *v.* Purchas, 2 B. & Ald. 39; New Haven County Bank *v.* Mitchell, 15 Conn. 206; Staats *v.* Howlett, 4 Denio, 559; 1 Parsons on Con. 502, *et seq.*

[3] Barclay *v.* Lucas, 3 Doug. 321, 1 T. R. 291, n. (*a*); Pease *v.* Hirst, 10 B. & Cr. 122.

[4] See Hassell *v.* Long, 2 M. & S. 370; Calvert *v.* Gordon, 7 B. & C. 809; Hough *v.* Warr, 1 C. & P. 151.

gence, without thereby discharging his guarantor.[1] It would seem just, however, that he should not be permitted to give him any indulgence which would materially prejudice the guarantor.[2] Generally, a guarantor may always pay a debt, and so acquire at once the right of proceeding against the party whose debt he has paid. On this ground, it has been held that where a surety requested the creditor to proceed against the principal debtor, and the creditor refused to do this, and afterwards the debtor became insolvent and the surety was without indemnity, still, the surety (or guarantor) was not discharged.[3] But if by gross negligence, the creditor has lost his debt, and has deprived the surety of security or indemnity, we should say that the surety must be discharged, unless he was equally negligent.[4] If a creditor gives time to his debtor, by a binding agreement which will prevent a suit in the mean time, this undoubtedly discharges the guarantor, because it deprives him of his power of paying the debt, and by that means acquiring a right of proceeding against the debtor.[5]

[1] Huffman *v.* Hulbert, 13 Wend. 377; Davis *v.* Huggins, 3 N. H. 231; Bellows *v.* Lovell, 5 Pick. 307; Erie Bank *v.* Gibson, 1 Watts, 143; Cope *v.* Smith, 8 S. & R. 110.

[2] Row *v.* Pulver, 1 Cow. 246; Herrick *v.* Borst, 4 Hill, 650.

[3] Bellows *v.* Lovell, 5 Pick. 307; Davis *v.* Huggins, 3 N. H. 231.

[4] See Pain *v.* Packard, 13 Johns. 174; King *v.* Baldwin, 17 id. 384; Row *v.* Pulver, 1 Cow. 246; Manchester Iron Man. Co. *v.* Sweeting, 10 Wend. 162; Huffman *v.* Hulbert, 13 id. 377; Herrick *v.* Borst, 4 Hill, 650. In New York, it is settled that if the surety requests the creditor to proceed against the principal debtor, and he refuses, and the principal debtor afterwards becomes insolvent, the surety will be discharged. See cases *supra*. But this rule has not been established there without much opposition. In Henrick *v.* Borst, 4 Hill. 650, *Cowen*, J., says: "What principle such a defence should ever have found to stand upon in any court, it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent, (Pain *v.* Packard, 13 Johns. 174,) was afterwards repudiated even by the Court of Chancery, (King *v.* Baldwin, 2 Johns. Ch. 554,) as it always has been, both at law and equity, in England; but was restored on a tie in the Court of Errors, turned by the casting vote of a layman. King *v.* Baldwin, 17 Johns. 384. *Platt*, J., and *Yates*, J., took that occasion to acknowledge that they had erred in Pain *v.* Packard, as Senator *Van Vechten* showed most conclusively that the whole court had done. . . . . I do not deny that the error has become inveterate, though it has never been treated with much favor. A *dictum* was referred to on the argument, in the Manchester Iron Man. Co. *v.* Sweeting, 10 Wend. 162, that the refusal to sue is tantamount to an agreement not to prosecute the surety. The remark meant, however, no more than that such a neglect as amounts to a defence is like the agreement not to sue in respect to being receivable under the general issue. The judge was speaking to the question whether the defence should not have been specially pleaded as it was in Pain *v.* Packard. On the other hand, it has often been said that the defence should not be encouraged, but rather discountenanced; and several decisions will be found to have proceeded on this ground." See Dawson *v.* Lawes, 23 E. L. & Eq. 365; Wetzel *v.* Sponsler, 18 Penn. St. 460.

[5] Leavitt *v.* Savage, 16 Maine, 72; Bailey *v.* Adams, 10 N. H. 162; Joslyn *v.* Smith, 13 Vt. 353; Lime Rock Bank *v.* Mallett, 34 Maine, 547.

If there be a failure on the part of the principal, and the guarantor is looked to, he should have reasonable notice of this. And, generally, at least, any notice would be reasonable which would be sufficient in fact to prevent his suffering from the delay. And if there be no notice, and the guarantor has been unharmed thereby, he is not discharged.[1]

If a guaranty purport to be official, that is, if made by one who claims to hold a certain office, and to give the promise of guaranty only as such officer, and not personally, the general rule is, that he is not liable personally, provided he actually held that office and had a right to give the guaranty officially.[2] But he would still be held personally if the promise made, or the relations of the parties indicated, that credit was given personally to the parties promising.[3]

[1] This is the well-settled law in Massachusetts. Oxford Bank *v.* Haynes, 8 Pick. 423; Bickford *v.* Gibbs, 8 Cush. 154. In this last case, *Shaw*, C. J., said: "This question has been much discussed, especially since the leading case of Oxford Bank *v.* Haynes, 8 Pick. 423. The principle to be deduced from that case, and the Pennsylvania case of Gibbs *v.* Cannon, 9 S. & R. 202, there cited with approbation and relied on, is this: That, in order to maintain an action against a guarantor, a demand of payment must be made in a reasonable time of the principal, and notice of non-payment given to the guarantor; and if, in consequence of want of such notice, the guarantor suffers loss, he is exonerated. Dole *v.* Young, 24 Pick. 250. The same prompt demand and notice as are required to charge an indorser, are not necessary; and if the circumstances of parties remain the same, and the guarantor suffers no loss by delay, demand and notice at any time before action brought will be sufficient. Babcock *v.* Bryant, 12 Pick. 133." But see Douglass *v.* Howland, 24 Wend. 35; Beebe *v.* Dudley, 6 Fost. 249; Farmers and Mechanics' Bank *v.* Kercheval, 2 Mich. 504.

[2] Macbeath *v.* Haldimand, 1 T. R. 172.

[3] Burrell *v.* Jones, 3 B. & Ald. 47; Appleton *v.* Binks, 5 East, 148; Hall *v.* Ashurst, 1 Cr. & M. 714; Redhead *v.* Cator, 1 Stark. 14; Sumner *v.* Williams, 8 Mass. 162.

CHAPTER VII.

OF THE STATUTE OF FRAUDS.

SECTION I.

OF ITS PURPOSE AND GENERAL PROVISIONS.

The Statute of Frauds, so called, was passed in the 29th year of Charles II. (1677) for the purpose of preventing frauds and perjuries, by requiring in many cases written evidence of a contract. It is very generally in force in this country, either by express enactment, or as a part of our common law. Those provisions which especially relate to commercial law, are contained in the fourth and seventeenth sections.

By the fourth section, it is enacted that "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or any contract for sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

By the seventeenth section, it is enacted that "no contract for the sale of any goods, wares, and merchandises, for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to

be charged by such contract, or their agents thereunto lawfully authorized."

The second and fifth clauses of the fourth section, and the whole of the seventeenth, relate to our present subject. The second clause prevents an *oral* guaranty from being enforced at law; but if money be paid on one, it cannot be recovered back.[1]

SECTION II.

OF A PROMISE TO PAY THE DEBT OF ANOTHER.

Such a promise, although in writing, is not valid without a consideration; as we have already stated and illustrated in the chapter on guaranty. And this necessity, and difficulty of distinguishing in many cases between an *original* promise, which need not be in writing, and a *collateral* promise which must be in writing, has caused much litigation; nor are all the rules which relate to this question as yet positively determined. Perhaps nothing better can be said than that, 1. Where the guaranty is made at the same time with the original promise, and is an essential cause of the credit given to the original promisor, that credit is a consideration for the collateral promise.[2] 2. Where the guaranty is given *after* the original promise is completed and credit given, there must be a new consideration for the guaranty.[3] 3. If, after the new promise is given, the original promisor remains liable, and there is no liability on the part of the guarantor other than what arises from his guaranty, this is a collateral promise, and is generally within the provisions of the statute, and must be in writing.[4]

[1] Griffith *v.* Young, 12 East, 513; Philbrook *v.* Belknap, 6 Vt. 383; Abbott *v.* Draper, 4 Denio, 51; Westfall *v.* Parsons, 16 Barb. 645.

[2] Per *Kent*, C. J., in Leonard *v.* Vredenburgh, 8 Johns. 29, a very leading and celebrated case upon this clause of the statute. In the recent case of Brewster *v.* Silence, 4 Seld. 207, in the New York Court of Appeals, *Willard*, J., adverting to the case of Leonard *v.* Vredenburgh, said: "The then chief justice hoped, by his learned and elaborate opinion in that case, to put at rest forever most of the questions arising under that branch of the statute of frauds which relates to special promises to answer for the debt, default, or miscarriage of another. But a review of the cases in this State, for the last forty years, will show how fruitless was the attempt. Instead of settling conflicting doubts, few questions have occasioned more controversy, or given birth to more nice and shadowy distinctions than those arising out of this branch of the statute of frauds."

[3] Ibid.

[4] See 2 Parsons on Con. 300, *et seq.*

It is often difficult to say whether the promise of one to pay for goods delivered to another, is an *original* promise, as to pay for one's own goods, or a promise to pay the debt or guaranty the promise of him to whom the goods are delivered. The question may always be said to be: *To whom did the seller give, and was authorized to give, credit.*[1] This question the jury will decide, upon consideration of all the facts, under the direction of the court.[2] If, on examination of the books of the seller, it appear that he charged the goods to the party who received them, it will be difficult, if not impossible, for him to maintain that he sold them to the other party.[3] But if he charged them to this other, such an entry would be good evidence, and if confirmed by circumstances, strong evidence that this party was the purchaser.[4] But it cannot be conclusive; for the party not receiving the goods may always prove, if he can, that he was not the buyer, and that he promised only as surety for the party who was the buyer; and, consequently, that his promise cannot be enforced if not in writing. And, in general, in determining this question, the court will always look to the actual character of the transaction, and the intention of the parties.[5]

If a promise or undertaking be once shown to be *original*, and not collateral, as we have endeavored to explain and illustrate

[1] In Birkmyr *v.* Darnell, 1 Salk. 27, the court said: "If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking, and void, without writing, by the Statute of Frauds. But if he says, 'Let him have the goods, I will be your paymaster,' or 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." So, in the well-considered case of Elder *v.* Warfield, 7 H. & John. 391, *Buchanan*, J., said: "If B gives credit to C for goods sold and delivered to him, on the promise of A to 'see him paid,' or 'to pay him for them if C should not,' in that case, it is the immediate debt of C, for which an action will lie against him, and the promise of A is a collateral undertaking to pay that debt, he being only as a security. But where the party undertaken for is under no original liability, the promise is an original undertaking, and binding upon the party promising, without being in writing. Thus, if B furnishes goods to C, on the express promise of A to pay for them, as if A says to him, 'Let C have goods to such an amount, and I will pay you,' and the credit is given to A, in that case C being under no liability, there is nothing to which the promise of A can be collateral; but A being the immediate debtor, it is his original undertaking, and not a promise to answer for the debt of another." See further upon this distinction, Watkins *v.* Perkins, 1 Ld. Raym. 224; Harris *v.* Huntbach, 1 Burr. 371; Jones *v.* Cooper, 1 Cowper, 227; Matson *v.* Wharam, 2 T. R. 80; Anderson *v.* Hayman, 1 H. Bl. 120; Keate *v.* Temple, 1 B. & P. 158; Storr *v.* Scott, 6 C. & P. 241; Flanders *v.* Crolius, 1 Duer, 206.

[2] See cases in preceding note.

[3] See Matthews *v.* Milton, 4 Yerg. 576; Gardiner *v.* Hopkins, 5 Wend. 23; Graham *v.* O'Neil, 2 Hall, 474; Porter *v.* Langhorn, 2 Bibb, 63. And see cases cited *supra*, n. (1.)

[4] See cases *supra*.

[5] Keate *v.* Temple, 1 B. & P. 158.

those terms, it can never be brought within the operation of the statute. This is a rule to which there is no exception that we are aware of. But the converse does not hold universally. For, though it is generally true, as we have said, that *collateral* promises are within the statute, there are several cases in the books of collateral promises to which it has been held that the statute did not apply. Many attempts have been made to discover a principle which would explain all these cases, and serve as a test in the future for distinguishing those collateral promises which are, from those which are not, within the statute. Chief Justice *Kent* stated the principle thus: "When the promise to pay the debt of another, arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties, it is not within the statute."[1] But this will scarcely explain all the cases, though it may most of them. We should prefer to state the distinction thus: Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another.[2]

An oral promise to pay the debt of another, and to do some other thing, can be enforced at law, if this other thing, and so much of the promise as relates to it, can be severed from the debt of the other and the promise relating to it.[3]

SECTION III.

OF AN AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.

Under the fifth clause in the fourth section, it is held that an agreement which *may* be performed within the year, is not affected by the statute, as the words, "that is not to be performed within one year," do not apply to an agreement which, when made, was, and by the parties was understood to be, fairly ca-

[1] Leonard *v.* Vredenburgh, 8 Johns. 29.

[2] See Nelson *v.* Boynton, 3 Met. 396; Alger *v.* Scoville, 1 Gray, 391. And see 2 Parsons on Con. 305 *et seq.*, where the cases on this subject are collected.

[3] Mayfield *v.* Wadsley, 3 B. & Cr. 357; Wood *v.* Benson, 2 Cr. & J. 94; Rand *v.* Mather, 7 Law Rep. N. S. 286.

pable of complete execution within a year, without the intervention of extraordinary circumstances, — although in point of fact its execution was extended much beyond the year.[1]

SECTION IV.

OF THE ACCEPTANCE OF A THING SOLD.

Under the exceptional clause in the seventeenth section, "*unless* the buyer shall accept and actually receive the same," it is clear that a mere delivery is not enough, without a distinct acceptance by the buyer.

But any thing would amount to a delivery and acceptance,

[1] An agreement may be incapable of performance within a year, either from the express terms of the agreement itself, or from its subject-matter, and in either case it is within the statute. Thus, in Bracegirdle *v.* Heald, 1 B. & Ald. 722, it was *held* that a contract made on the 27th of May, for a year's service, to commence on the 30th of June following, was within the statute. So, where A, on the 20th of July, made proposals to B to enter his service as bailiff for a year, and B took the proposals and went away, and entered into A's service on the 24th of July, it was *held* that this was a contract on the 20th, and so not to be performed within the space of one year from the making, and within the 4th section of the Statute of Frauds. Snelling *v.* Lord Huntingfield, 1 Cr. M. & Ros. 20. Again, in Birch *v.* The Earl of Liverpool, 9 B. & Cr. 392, it was *held* that a contract whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, was within the statute. And see Hill *v.* Hooper, 1 Gray, 131. So, if it is clear, from the whole scope of a contract, taking into view its subject-matter and the stipulations of the parties, that the parties contemplated more than a year, as the period for its performance, it is within the statute. See Boydell *v.* Drummond, 11 East, 142; Herrin *v.* Butters, 20 Maine, 119. But where the time for the performance of a contract is made to depend upon some contingency, which may or may not happen within a year, the contract is not within the statute. This was decided against the opinion of *Holt*, C. J., in the case of Peter *v.* Compton, Skin. 353. There, the defendant promised for one guinea to give the plaintiff so many guineas on the day of his marriage. And it was *held* that the plaintiff was entitled to recover, although the agreement was not in writing. And see Fenton *v.* Emblers, 3 Burr. 1278; Wells *v.* Horton, 4 Bing. 40. And this doctrine has been carried so far as to include a case where one undertakes to abstain from doing a certain thing, without limitation as to time, on the ground that such a contract is in its nature binding only during the life of the party. Thus, in Lyon *v.* King, 11 Met. 411, the defendant, for a good consideration, promised the plaintiff that he would not thereafter engage in the staging or the livery stable business in Southbridge. And the court *held* that the contract was not within the statute. *Dewey*, J., said: "The contract might have been wholly performed within a year. It was a personal engagement to forbear doing certain acts. It stipulated nothing beyond the defendant's life. It imposed no duties upon his legal representatives, as might have been the case under a contract to perform certain positive duties. The mere fact of abstaining from pursuing the staging and livery stable business, and the happening of his death during the year, would be a full performance of this contract. Any stipulation in the contract, looking beyond the year, depended entirely upon the contingency of the defendant's life; and this being so, the case falls within the class of cases in which it has been held that the statute does not apply." And see Foster *v.* McO'Blenis, 18 Missouri, 88. For a more full collection of cases on this clause of the statute, see 2 Parsons on Con. 316 *et seq.*

which was intended to be so, and was received as such, and which actually put the goods within the reach and power of the buyer.[1] The symbolical deliveries before mentioned, as the delivery of the key of a warehouse,[2] or an entry in the books of the warehouse keeper,[3] or indorsement and delivery of a bill of lading, or even of a receipt, in many cases,[4] or a delivery of a part of one whole, without the intention of separating it from the rest, are sufficient.[5] But some of many distinct and severable things may be delivered without this operating as a delivery of the rest;[6] nor is the delivery of a sample sufficient, unless it be delivered as a part of the thing sold.[7] The subject of delivery has also been considered in the chapter on Sales.

If the buyer receives the goods, but reserves the right of returning them and rescinding the sale if they are not satisfactory, or as represented, this we should hold to be a *conditional* acceptance, which does not suffice to take the case out of the statute, until this reserved right be extinguished by lapse of time or otherwise. But there has been much litigation on this question, and there is still some uncertainty.[8]

"Earnest" must be given and received as such to make the sale valid under that clause of the statute. And the part-payment must be actual, and not a mere agreement that something else, as a discharge of an existing debt, shall be taken as part-payment.[9]

[1] Phillips *v.* Bistolli, 2 B. & Cr. 511; Dole *v.* Stimpson, 21 Pick. 384; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Howe *v.* Palmer, 3 B. & Ald. 321; Maberley *v.* Sheppard, 10 Bing. 99; Carter *v.* Toussaint, 5 B. & Ald. 855; Baldey *v.* Parker, 2 B. & Cr. 37; Bill *v.* Bament, 9 M. & W. 41; Shindler *v.* Houston, 1 Denio, 48, 1 Comst. 261.

[2] Wilkes *v.* Ferris, 5 Johns. 335; Chappel *v.* Marvin, 2 Aik. 79.

[3] Harman *v.* Anderson, 2 Campb. 243.

[4] Peters *v.* Ballister, 3 Pick. 495; Wilkes *v.* Ferris, 5 Johns. 335; Searle *v.* Keeves, 2 Esp. 598; Harman *v.* Anderson, 2 Campb. 243; Withers *v.* Lyss, 4 id. 237; Tucker *v.* Ruston, 2 C. & P. 86. But see Farina *v.* Hone, 16 M. & W. 119; Bentall *v.* Burn, 3 B. & Cr. 423; Lackington *v.* Atherton, 7 M. & Gr. 360. And see *ante*, p. 44, n. 4.

[5] Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 4 B. & P. 69; Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* The Eastern Counties Railway Co. 12 M. & W. 33; Biggs *v.* Wisking, 25 E. L. & Eq. 257; Mills *v.* Hunt, 20 Wend. 431; Davis *v.* Moore, 13 Maine, 424.

[6] Price *v.* Lea, 1 B. & Cr. 156; Seymour *v.* Davis, 2 Sandf. 239.

[7] Talver *v.* West, Holt, N. P. 178; Johnson *v.* Smith, Anthon, N. P. 60, 81, 2d Ed.; Hinde *v.* Whitehouse, 7 East, 558.

[8] See per *Parke*, J., in Smith *v.* Surman, 9 B. & Cr. 561, 577; Norman *v.* Phillips, 14 M. & W. 277; Howe *v.* Palmer, 3 B. & Ald. 321; Hanson *v.* Armitage, 5 B. & Ald. 557; Acebal *v.* Levy, 10 Bing. 376; Cunliffe *v.* Harrison, 6 Exch. 903; Curtis *v.* Pugh, 10 Q. B. 511; Morton *v.* Tibbett, 15 Q. B. 428; Hunt *v.* Hecht, 20 E. L. & Eq. 524.

[9] Walker *v.* Nussey, 16 M. & W. 302.

SECTION V.

OF THE FORM AND SUBJECT-MATTER OF THE AGREEMENT.

The "agreement" must be in writing; but generally, in this country, the writing need not contain or express the consideration, which may be proved otherwise.[1] Nor need it be all on one piece of paper. For it is sufficient if on several pieces, as in several letters, which, however, relate to one and the same business, and may fairly be read together as the statement of one transaction.[2]

The "signature" may be in any part of the paper — the beginning, middle, or end,[3] except in those of our States in which the statute has the word "subscribed" instead of "signed;" in which case it must be in the usual place at the bottom.[4] If the name and the agreement be *printed*, it is sufficient;[5] hence, a printed shop bill, with the name of the seller, as usual, at the beginning, if delivered to the buyer, is sufficient to charge the seller in an action for refusing to deliver the goods.[6]

Shares in railroad companies, manufacturing companies, and, we think, in all corporations and joint-stock companies, are "goods, wares, or merchandises," within the statute.[7]

[1] Packard *v.* Richardson, 17 Mass. 122; Sage *v.* Wilcox, 6 Conn. 81; Tufts *v.* Tufts, 3 Wood. & M. 456; Reed *v.* Evans, 17 Ohio, 128; Gillighan *v.* Boardman, 29 Maine, 79. But in some of the States, the English doctrine, which requires the consideration to be expressed in writing, has been adopted. See Sears *v.* Brink, 3 Johns. 210; Bennett *v.* Pratt, 4 Denio, 275; Staats *v.* Howlett, id. 559; Wyman *v.* Gray, 7 H. & Johns. 409; Elliott *v.* Giese, id. 457; Edelen *v.* Gough, 5 Gill, 103.

[2] Brettel *v.* Williams, 4 Exch. 623; Tawney *v.* Crowther, 3 Bro. C. C. 318; Saunderson *v.* Jackson, 2 B. & P. 238; Forster *v.* Hale, 3 Ves. 696; Ide *v.* Stanton, 15 Vt. 685.

[3] Propert *v.* Parker, 1 Rus. & M. 625; Johnson *v.* Dodgson, 2 M. & W. 653; Merritt *v.* Clason, 12 Johns. 102; S. C. *nom.* Clason *v.* Bailey, 14 id. 484; Saunderson *v.* Jackson, 2 B. & P. 238. But if the signature be only at the beginning or in the body of the instrument, and it cannot be reasonably inferred from the whole agreement and the circumstances of the case, that it was placed there for the purpose of rendering the agreement binding, it will not be sufficient. Stokes *v.* Moore, 1 Cox, 219; Cabot *v.* Haskins, 3 Pick. 83; Cowie *v.* Remfry, 10 Jur. 789.

[4] Davis *v.* Shields, 24 Wend. 322, 26 id. 341; Vielie *v.* Osgood, 8 Barb. 130. But see James *v.* Patten, id. 344.

[5] Saunderson *v.* Jackson, 3 Esp. 180, 2 B. & P. 238.

[6] Schneider *v.* Norris, 2 M. & S. 286.

[7] Tisdale *v.* Harris, 20 Pick. 9; Colvin *v.* Williams, 3 H. & Johns. 38; North *v.* Forest, 15 Conn. 400. It is held otherwise in England. Humble *v.* Mitchell, 11 Ad. & El. 205; Duncuft *v.* Albrecht, 12 Sim. 189.

We think — in opposition to certain authorities, but in accordance with those of more recent date — that an executory contract for sale is within the statute.[1] So a contract for an article not now the seller's, or not existing, and which must therefore be bought or manufactured before it can be delivered, will also be within the statute, if it may be procured by the seller by purchase from any one, or manufactured by himself at his choice, the bargain being, in substance as well as form, only that the seller shall, on a certain day, deliver certain articles to the buyer for a certain price.[2] But if the bargain be rather that the one party shall make a certain article, and deliver it to the other party who shall thereupon pay him for his materials, skill, and labor, this is not a contract of or for sale, but an agreement to hire and pay for work and labor, — or to *employ* that party in a certain way; and it is not within the Statute of Frauds as a contract for the sale of goods, wares, or merchandises.[3]

The operation of the statute in the clauses we have considered, is not to avoid the contract, but only to inhibit and prevent actions from being brought upon it. In all other respects, it is valid.[4]

It may be further remarked that the operation of the statute

[1] Rondeau *v.* Wyatt, 2 H. Bl. 63; Cooper *v.* Elston, 7 T. R. 14; Bennett *v.* Hull, 10 Johns. 364; Jackson *v.* Covert, 5 Wend. 139; Downs *v.* Ross, 23 id. 270; Garbutt *v.* Watson, 5 B. & Ald. 613; Smith *v.* Surman, 9 B. & Cr. 561.

[2] See next note. But see, *contrà*, Sewall *v.* Fitch, 8 Cow. 215; Robertson *v.* Vaughn, 5 Sandf. 1.

[3] Hight *v.* Ripley, 19 Maine, 137; Gardner *v.* Joy, 9 Met. 177; Mixer *v.* Howarth, 21 Pick. 205; Spencer *v.* Cone, 1 Met. 283; Lamb *v.* Crafts, 12 id. 353; Waterman *v.* Meigs, 4 Cush. 497; Watts *v.* Friend, 10 B. & Cr. 446. In Hight *v.* Ripley, *supra*, *Shepley*, C. J., said: "It may be considered as now settled that the Statute of Frauds embraces executory as well as executed contracts for the sale of goods. But it does not prevent parties from contracting verbally for the manufacture and delivery of articles. The only difficulty now remaining is, to decide whether the contract be one for the sale, or for the manufacture and delivery of the article. It may provide for the application of labor to materials already existing partially or wholly in the form designed, and that the article improved by the labor shall be transferred from one party to the other. In such cases, there may be difficulty in ascertaining the intentions; and the distinction may be nice, whether it be a contract for sale or for manufacture. . . . A contract for the manufacture of an article differs from a contract of sale in this; the person ordering the article to be made, is under no obligation to receive as good or even a better one of the like kind purchased from another, and not made for him. It is the peculiar skill and labor of the other party, combined with the materials, for which he contracted, and to which he is entitled."

[4] Cahill *v.* Bigelow, 18 Pick. 369; Dowdle *v.* Camp, 12 John. 451; Souch *v.* Strawbridge, 2 C. B. 808; Crane *v.* Gough, 4 Maryland, 316; Leroux *v.* Brown, 14 E. L. & Eq. 247. In this last case, the plaintiff, who was a resident of Calais, in France, entered into a parol agreement with the defendant, who resided in England,

has been always limited to such executory contracts as have not been executed in any substantial part.[1]

to serve him as clerk and agent for one year, from a future day; and it was held that the case came within the Statute of Frauds, and that an action on the contract could not be maintained in England; but that this decision did not prevent the plaintiff from enforcing the agreement by a bill in equity, or by an action on the contract in France; that the statute does not say that the contract is void; but only that "no action shall be brought upon it." *Jervis*, C. J., said: "I am of opinion that this rule must be made absolute. There has been no discussion at the bar as to the principles which ought to govern our decision. It is admitted by the plaintiff's counsel, that if the 4th section of the Statute of Frauds applies, not to the validity of the contract, but only to the mode of procedure upon it, then that, as there is no "agreement, or memorandum, or note thereof" in writing, this action is not maintainable. On the other hand, it is not denied that, if that section applies to the contract itself, or, as Boullenois says, to the "solemnities of the contract," inasmuch as our law does not affect to regulate foreign contracts, the action is maintainable. On consideration, I am of opinion that the 4th section does not apply to the "solemnities" of the contract, but to the proceedings upon it; and therefore, that this action cannot be maintained. The 4th section, looked at in contrast with the 1st, 2d, 3d, and 17th, leads to this conclusion. The words are: "No action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." It does not say that, unless those requisites are complied with, the contract shall be void, but only that "no action shall be brought upon it;" and, as put by Mr. Honyman with great force, the alternative requiring the "agreement or some memorandum thereof" to be in writing, shows that the legislature contemplated a contract, good before any writing, but not enforceable without the writing as evidence of it."

[1] Stone *v.* Dennison, 13 Pick. 1; Davenport *v.* Mason, 15 Mass. 85, 93; Cocking *v.* Ward, 1 C. B. 858; Kelly *v.* Webster, 12 id. 283. And see 2 Parsons on Con. 319.

CHAPTER VIII.

OF PAYMENT.

SECTION I.

HOW PAYMENT MAY BE MADE.

The obligations which arise out of many mercantile contracts are to be satisfied by payment of money. The parties may always agree to any specific manner of payment, and then that becomes obligatory on the creditor as well as the debtor. As, by deducting the amount to be paid from a debt due to the debtor either from the creditor or from any one else.[1] Or the amount may be made by agreement payable by a bill or note. If the debt is to be paid by a bill, it must be such a bill as is agreed upon, and this must be tendered by the debtor. But the word "bill" does not necessarily mean an "approved bill;" and if this phrase be itself used, it means only a bill to which there is no reasonable objection.[2]

In the absence of any especial agreement, the only payment known to the law is by cash, which the debtor must pay when it is due, or tender to the creditor.

The tender should, properly, be in cash, and must be so if that

[1] Owens *v.* Denton, 5 Tyrwh. 360. So, also, an agreement that goods furnished by the debtor shall go in satisfaction of the debt, is equivalent to an actual payment. Hooper *v.* Stephens, 4 Ad. & El. 71; Hart *v.* Nash, 2 Cr. M. & Ros. 337.

[2] Thus, in Hodgson *v.* Davies, 2 Campb. 530, which was an action for refusing to deliver goods purchased by the plaintiff of the defendant, to be paid *by bill*, the plaintiff proved that he had tendered his own acceptances in payment; whereupon the defendant offered to call witnesses to prove that *by bill* is meant an *approved bill*, and that the seller is not bound to deliver the goods, unless he approves of the bill offered in payment by the purchaser. But Lord *Ellenborough* said: "I cannot receive the evidence. The contract must speak for itself. Even if the phrase *approved bill* were introduced, I think it could only mean a bill to which no reasonable objection could be made, and which ought to be approved. To allow the seller in an arbitrary manner to repudiate the bill, would be to enable him, according to his interest or caprice, to annul a contract by which the purchaser is absolutely bound."

is required; but a tender in good and current bank-bills is sufficient, unless it be objected to because they are not money.[1]

Generally, if the tender be refused for any express and specific reason, the creditor cannot afterwards take advantage of any *informality*, to which he did not object at the time of the tender.[2]

The tender may be of a larger sum than is due.[3] But a tender of a larger sum with a requirement of change or of the balance, is not good.[4] Nor must it be accompanied with a demand or condition that any instrument or document shall be delivered; nor that the sum tendered shall be received as all that is due; nor that a receipt in full shall be given.[5] But it seems that a simple receipt for so much money paid may, perhaps, be demanded.[6] We have already seen that, if a receipt be given, it is only *primâ facie* and strong evidence of payment, but not conclusive. And even if it be "in full of all demands," it is still open to explanation or denial by evidence.[7]

A lawful tender, and payment of the money into court, is a good defence to an action for the debt.[8] But the creditor may break down this defence by proving that he demanded the money of the debtor, and the debtor refused to give it, subsequently to the tender.[9]

[1] Snow *v.* Perry, 9 Pick. 542; Warren *v.* Mains, 7 Johns. 476; Hoyt *v.* Byrnes, 2 Fairf. 475; Tiley *v.* Courtier, 2 Cr. & J. 16, n.; Wright *v.* Reed, 3 T. R. 554; Polglass *v.* Oliver, 2 Cr. & Jer. 15.

[2] Cole *v.* Blake, Peake, 179; Richardson *v.* Jackson, 8 M. & W. 298; Bull *v.* Parker, 2 Dowl. N. S. 345.

[3] Astley *v.* Reynolds, 2 Strange, 916; Wade's case, 5 Rep. 115; Dean *v.* James, 4 B. & Ad. 546; Douglas *v.* Patrick, 3 T. R. 683; Black *v.* Smith, Peake, 88; Cadman *v.* Lubbock, 5 D. & R. 289; Bevans *v.* Rees, 5 M. & W. 306.

[4] Betterbee *v.* Davis, 3 Camph. 70. And see Robinson *v.* Cook, 6 Taunt. 336; Blow *v.* Russell, 1 C. & P. 365.

[5] Thus, in Glasscott *v.* Day, 5 Esp. 48, the sum claimed by the plaintiff was £20. The defendant pleaded *non assumpsit*, except as to £18, and as to that, a tender. The witness for the defendant, who proved the tender, stated that he went to the plaintiff with the money, which he offered to pay on the plaintiff's giving him a receipt in full. The plaintiff refused to receive it. And Lord *Ellenborough* held this not to be a good tender. So, in Thayer *v.* Brackett, 12 Mass. 450, where the defendant, upon making a tender, demanded a receipt in full, *Parker*, C. J., said: "The defendant lost the benefit of his tender by insisting on a receipt in full of all demands, which the plaintiff was not obliged to give him. The defendant should have relied on his tender, and upon proof at the trial that no more was due. But he withdrew the tender, because the plaintiff would not comply with the terms which accompanied it. This cannot be deemed a lawful tender."

[6] See 2 Parsons on Contracts, pp. 155, 156, n. (*f.*)

[7] See *ante*, p. 23, n. 1.

[8] Dixon *v.* Clark, 5 C. B. 365; Waistell *v.* Atkinson, 3 Bing. 290; Law *v.* Jackson, 9 Cow. 641; Carley *v.* Vance, 17 Mass. 389; Cornell *v.* Green, 10 S. & R. 14; Goff *v.* Rehoboth, 2 Cush. 475.

[9] See cases *supra*.

If the buyer or debtor give, and the seller or creditor receive, a negotiable note or bill for the sum due, this is not anywhere absolute and conclusive payment. In Maine and in Massachusetts the law presumes that such note or bill is payment of the debt, unless a contrary intention is shown.[1] In England, in the other States of this Union, and in the Supreme Court of the United States, it is not payment unless the intention of the parties that it should be so, is shown.[2] In New York, it has been held that the debtor's own promissory note is not payment, even if it be intended or expressly agreed that it should be.[3] If a creditor who receives from his debtor any bill or note, negotiates or sells it for value to a third party, without making himself liable, it is still payment although it be dishonored, because it has been good to him and he has received the avails of it; and if it is not held payment, he can recur to his original debtor, and then he will have the value of the bill, or payment, twice.[4] Not so, however, if he negotiates it in such a way as to make himself liable upon it.[5]

SECTION II.

OF APPROPRIATION OF PAYMENT.

If one who owes several debts to his creditor, makes to him a general payment, it may be an important question to which of those debts this payment shall be appropriated; for some of them may be secured, and others not, or some of them carry interest, and others not, or some of them be barred by the Statute of Limitations, and others not.

There is no doubt that the payor may appropriate his payment, at the time of the payment, at his own pleasure.[6] And if

[1] Ilsley *v.* Jewett, 2 Met. 168; Butts *v.* Dean, id. 76; Watkins *v.* Hill, 8 Pick. 522; Varner *v.* Nobleborough, 2 Greenl. [Bennett's ed.] 121, and n. (*a*); Bangor *v.* Warren, 34 Maine, 324; Fowler *v.* Ludwig, id. 455; Shumway *v.* Reed, id. 560.

[2] Peter *v.* Beverly, 10 Pet. 567; Wallace *v.* Agry, 4 Mason, 336; Van Ostrand *v.* Reed, 1 Wend. 424; Burdick *v.* Green, 15 Johns. 247; Hughes *v.* Wheeler, 8 Cow. 77; Bill *v.* Porter, 9 Conn. 23.

[3] Frisbie *v.* Larned, 21 Wend. 450; Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 Hill, 448, 3 Denio, 410.

[4] Bunney *v.* Poyntz, 4 B. & Ad. 568.

[5] Miles *v.* Gorton, 4 Tyrwh. 295.

[6] Cremer *v.* Higginson, 1 Mason, 338; Tayloe *v.* Sandiford, 7 Wheat. 13; West Branch Bank *v.* Moorehead, 5 W. & S. 542; Stone *v.* Seymour, 15 Wend. 19; Newmarch *v.* Clay, 14 East, 239; Shaw *v.* Picton, 4 B. & Cr. 715.

he does not exercise this right, perhaps it is as certain that the receiver may, at the time of payment, make the appropriation.[1] But if neither party does this *at that time*, and at a future period the question comes up as to which party may then make the appropriation, or rather, how the law will then appropriate the payment, there is more difficulty.[2] Upon the whole, we should prefer to state, as the better and prevailing rule, that, if the court can ascertain, either from the words used, or from the circumstances of the case, or from any usage, what was the intention and understanding of the parties at the time of the payment, that intention will be carried into effect. And if this cannot be ascertained, then the court will direct such appropriation of the payment as will best protect the rights and interests of both parties, and do justice between them.[3] And one reason for this conclusion would be, that the law would presume that this was the original intention of the parties.

[1] Peters *v.* Anderson, 5 Taunt. 596; Bosanquet *v.* Wray, 6 id. 597; Goddard *v.* Cox, 2 Strange, 1194; Plomer *v.* Long, 1 Stark. 153; Marryatts *v.* White, 2 id. 101.

[2] In England, it seems to be held that the creditor need not make the appropriation at the time of the payment, but may do it at any time before the trial. Thus, in Simpson *v.* Ingham, 2 B. & Cr. 75, *Best*, J., said: "It is true that Sir William Grant says, in Clayton's case, that, by the civil law, the application is given first to the debtor, and then to the creditor, and that as well the creditor as the debtor must make his election at the time of payment; and that, unless election be immediately made, the law will appropriate it in discharge of the most burdensome, and if all are equally burdensome, of the oldest debts. But, according to the cases there cited, our law does not require of the creditor an instant decision. I think that he has a reasonable time to decide, to which account he will place a sum that has been paid him without any application of it by his debtor." And see the later case of Philpott *v.* Jones, 2 Ad. & El. 41, where *Taunton*, J., said the creditor might make the application "at any time before the case came under the consideration of a jury."

[3] Field *v.* Holland, 6 Cranch, 8, 27; United States *v.* Wardwell, 5 Mason, 82; Smith *v.* Loyd, 11 Leigh, 512; Callahan *v.* Boarman, 21 Ala. 246; United States *v.* Kirkpatrick, 9 Wheat. 720, 737. In this last case, the defendants were obligees of a bond to indemnify the plaintiffs against any loss by their collector during the period of his first commission; and a question arose whether the plaintiffs could appropriate payments, made by the collector during that time, to debts accruing subsequently. *Story*, J., said: "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *à fortiori* at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of the opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due."

CHAPTER IX.

OF NEGOTIABLE PAPER.

SECTION I.

OF THE PURPOSE OF AND PARTIES TO BILLS AND NOTES.

Where and when bills of exchange were invented, is not certainly known. They were not used by any ancient nations, but have been employed and recognized by most commercial nations for some centuries. A still more recent invention is the promissory negotiable note, which, however, in this country, for inland and domestic purposes, has taken the place of the bill of exchange very generally. Besides these two, bills of lading, and some other documents, have a kind of negotiability, but it is quite imperfect.[1] The utility of bills and notes in commerce arises from the fact that they represent money, which is the representative of every thing else; and many of the peculiar rules respecting negotiable paper, are derived from and intended to make this representation adequate and effectual.

A negotiable bill of exchange is a written order whereby A orders B to pay to C, or to his order, or to bearer, a sum of money, absolutely and at a certain time. A is the Drawer, B the Drawee, and C the Payee. If the bill is presented to B, and he agrees to obey the order, which he does in a mercantile way by writing the word "accepted" across the face of the bill, and also writing his name below this word, the drawee then becomes the Acceptor. If C, the payee, choose to transfer the paper and all his rights under it to some other person, he may do this by writing his name on (usually across) the back; this is called indorsement, and C then becomes an Indorser. The person to whom C thus transfers the bill, is an Indorsee. He may again transfer the bill by writing his name below that of the former Indorser, and the Indorsee then becomes the second Indorser;

[1] See Thompson *v.* Dominy, 14 M. & W. 403.

and this process may go on indefinitely. If the added names cover all the back of the note, a piece may be wafered on to receive more. In France, this added piece is called "*allonge*," and this word is used in some text-books, but not by our merchants.

A negotiable promissory note is a written promise to pay to a certain person or his order, or to bearer, at a certain time, a certain sum of money. He who signs this is called the Maker or the Promisor; the other party is the Promisee or Payee. The payee of such a note has the same power of indorsement as the payee of a bill of exchange. If the note be not payable to any order, nor to bearer, it is then not negotiable; but it has been held that, if such a note be indorsed by the payee, payable to some person or his order, this becomes negotiable as between the indorser and indorsee, and subsequent parties. Such an indorsement may in fact be regarded as a bill of exchange, drawn by the payee of the note upon the maker, in favor of the person to whom the note is indorsed.[1] The maker of a negotiable note holds much the same position as the acceptor of a bill, the drawer much the same as the first indorser of a note; that is, a party holding a note and seeking payment of it, looks first to the maker, and then to the indorser. One holding a bill, looks first to the drawee or acceptor, and, on his failure, to the drawer.

Neither indorsement nor acceptance, nor, indeed, making, are complete until delivery and reception of the bill or note, or acceptance; and a defendant may show that there was no legal delivery of the paper.[2]

[1] Leidy *v.* Tammany, 9 Watts, 353; Brenzer *v.* Wightman, 7 W. & S. 264; Elkinton *v.* Fennimore, 13 Penn. St. 173.

[2] Chamberlain *v.* Hopps, 8 Vt. 94; Adams *v.* Jones, 12 Ad. & El. 455; Brind *v.* Hampshire, 1 M. & W. 365; Marston *v.* Allen, 8 M. & W. 494; Buckley *v.* Hann, 5 Exch. 43. Perhaps, however, the proposition in the text should be qualified so far as regards an acceptance. In Regina *v.* Birch, 1 Lownd. & Max. 56, S. C., *nom.* Wilde *v.* Sheridan, 11 Eng. Law and Eq. 380, where an acceptance was written on a bill in London, and the bill delivered to the payee in Norwich, and the question was, at which place the bill was accepted, it was *held*, per *Coleridge*, J., that the acceptance of a bill, though revocable at any time before delivery, is, if unrevoked, complete as soon as written on the bill; and the contract is made in that place where the bill is accepted, not where it is issued. And the learned judge thus distinguished an acceptance from an indorsement: "One purpose of an indorsement is to pass the property in the bill, and that purpose is not effected until actual or constructive delivery. But the acceptor has no property in the bill, either before or after an acceptance; he must be supposed to receive the drawer's paper, and on it to write his promise, without thereby in any way altering the property in the bill. He may, indeed, before any communication to the drawer of the act done, revoke it, according to Cox *v.* Troy, 5 B. & Ald. 474, and modern authorities; but his promise, unless so revoked, is complete and takes effect from the time when it was made." And see Smith *v.* M'Clure, 5 East, 476; Roff *v.* Miller, 19 Law J. C. P. 278, which support the same view.

The law of negotiable paper first defines a bill or note, and determines what instruments come under these names, and then describes and ascertains the duties and obligations of all the parties we have named above. We shall follow this order.

SECTION II.

WHAT IS ESSENTIAL TO A BILL OR NOTE.

1. *That the promise be absolute and definite.* — The promise of the note, and the order of the bill, must be absolute. Words expressive of intention in the one case, or a request which imports only to ask a favor, in the second case, are insufficient.[1] But no one word, and no set of words, is absolutely necessary; if from all the language the distinct promise or positive order can be inferred, that is sufficient.[2]

The time of payment is usually written in a bill or note; if not, it is payable on demand. The time of payment must not be uncertain; therefore, a promise is insufficient if it be to pay on one's marriage, or if certain terms are complied with, or on the sale of certain goods, or at thirty days after the arrival of a ship, or out of a certain expected payment when it should be made.[3] But if it distinctly refers to an event which must happen, as to one's death, it has been held good;[4] and this has been extended to the paying off of the crew of a public vessel;[5] but we doubt the soundness of this decision. In fact, any contingency apparent on the face of the instrument, defeats it; and the happening of the contingency does not cure it. And the payment promised or ordered must be of a definite sum of money; and, therefore, a promise to pay a certain sum "and all fines," is

[1] Thus, in Little *v.* Slackford, M. & Malk. 171, a paper in these words, "Mr. L., please to let the bearer have £7, and place it to my account, and you will oblige your humble servant, R. S.," was held, by Lord *Tenterden*, not to be a bill of exchange. And see Horne *v.* Redfearn, 4 Bing. N. C. 433.

[2] See Morris *v.* Lee, 2 Ld. Raym. 1396; Ellison *v.* Collingridge, 9 C. B. 570; Allen *v.* The Sea Fire and Life Ins. Co. id. 574.

[3] Beardesley *v.* Baldwin, 2 Strange, 1151; Pearson *v.* Garrett, 4 Mod. 242; Roberts *v.* Peake, 1 Burr. 323; Hill *v.* Halford, 2 B. & P. 413; Clarke *v.* Percival, 2 B. & Ad. 660; Palmer *v.* Pratt, 2 Bing. 185; Haydock *v.* Lynch, 2 Ld. Raym. 1563; Shelton *v.* Bruce, 9 Yerg. 24; De Forest *v.* Frary, 6 Cow. 151.

[4] Cooke *v.* Colehan, 2 Strange, 1217; Goss *v.* Nelson, 1 Burr. 226.

[5] Andrews *v.* Franklin, 1 Strange, 24; Evans *v.* Underwood, 1 Wils. 262.

not a promissory note.[1] But if the contingency be wholly in the payee's power, the note may still be good; thus, a promise to pay a sum, with interest, in twelve months after notice, was held a good note.[2] The promise or order to pay out of a certain fund, is not fatal, if this be merely descriptive or directory;[3] but if it must or should be construed as making the payment depend upon the fund, however ample and certain that may seem, it is a fatal contingency.[4] So, an order to pay rents accruing to a certain time, or to pay over a sum out of money collected by an attorney, or an order drawn on the treasury by a public officer, is not a bill of exchange.[5] Nor is a bill drawn by one government upon another for a treaty-payment, subject to the law-merchant as a bill, and incident to protest, damages, &c.[6] An order drawn expressly for the whole of a particular fund, will operate as a transfer of that fund, although not recognizable as a bill of exchange.[7]

A bill of exchange or promissory note must be payable in money only, and not in goods or merchandise, or property of any kind, or by the performance of any act.[8] If payable in "current funds," or "good bank-notes," or "current bank-notes," this should not be sufficient on general principles, and according to many authorities;[9] some courts, however, construe this as meaning notes convertible on demand into money, and therefore as the same thing as money.[10]

A bill or note may be written upon any paper or proper substitute for it, in any language, in ink or pencil.[11] A name may be

[1] Ayrey *v.* Fearnsides, 4 M. & W. 168.
[2] Clayton *v.* Gosling, 5 B. & Cr. 360.
[3] Macleed *v.* Snee, 2 Strange, 762.
[4] Haydock *v.* Lynch, 2 Ld. Raym. 1563; Dawkes *v.* Lord De Lorane, 3 Wils. 207; Yeates *v.* Grove, 1 Ves. Jun. 280; Carlos *v.* Fancourt, 5 T. R. 482.
[5] Jenney *v.* Herle, 2 Ld. Raym. 1361; Crawford *v.* Cully, Wright, (Ohio,) 453; Van Vacter *v.* Flack, 1 Sm. & Marsh. 393; Reeside *v.* Knox, 2 Whart. 233; Morton *v.* Naylor, 1 Hill, 583.
[6] United States *v.* Bank of the United States, 5 How. 382.
[7] Cowperthwaite *v.* Sheffield, 1 Sandf. 416.
[8] Jerome *v.* Whitney, 7 Johns. 321; Thomas *v.* Roosa, id. 461; Atkinson *v.* Manks, 1 Cow. 691, 707; Clark *v.* King, 2 Mass. 524. And an instrument containing, in addition to a promise to pay money, stipulations to do other things, is not a promissory note. Austin *v.* Burns, 16 Barb. 643. Therefore, an instrument which contained a promise to deliver up horses and a wharf, and also to pay money at a particular day, was held not to be a promissory note. Martin *v.* Chauntry, 2 Stra. 1271.
[9] M'Cormick *v.* Trotter, 10 S. & R 94; Gray *v.* Donahoe, 4 Watts, 400; Hasbrook *v.* Palmer, 2 McLean, 10; Fry *v.* Rousseau, 3 id. 106.
[10] Keith *v.* Jones, 9 Johns. 120; Judah *v.* Harris, 19 Johns. 144; Swetland *v.* Creigh, 15 Ohio, 118.
[11] Geary *v.* Physic, 5 B. & Cr. 234.

signed or indorsed by a mark;[1] and, though usually written at the bottom, it may be sufficient if written in the body of the note; as "I, A B, promise," &c.; unless it can be shown that the note was incomplete, and was intended to be finished by signature.[2] If not dated, it will be considered as dated when it was made; but a written date is *primâ facie* evidence of the time of making.[3] The amount is usually written in figures at the corner or bottom. If the sum is written at length in the body, and also in figures at the corner, it seems that the written words control the figures, and evidence is not admissible to show that the figures were right and the words inaccurate;[4] but the omission of such a word as "dollars," or "pounds," or "sterling," may be supplied, if the meaning of the instrument is quite clear.[5]

2. *The payee must be designated.* — The payee should be distinctly named, unless the bill or note be made payable to bearer.[6] And if he be named, and the note get into the possession of a wrong person of the same name, this person neither has nor can give a title to it.[7] If the name be spelt wrong, evidence of intention is receivable.[8] If father and son have the same name, and the son have possession of the note and indorse it, this would be evidence of his rightful ownership; but in the absence of evidence, it is said that the presumption of law would give the note to the father;[9] but this must depend on circumstances.

If neither payable to bearer, nor to the maker's or drawer's order, nor to any other person, it would be an incomplete and invalid instrument.[10] If the payee of a bill be fictitious, and the

[1] George *v.* Surrey, M. & Malk. 516.
[2] Taylor *v.* Dobbins, 1 Stra. 399; Elliot *v.* Cooper, 2 Ld. Raym. 1376; Ereskine *v.* Murray, id. 1542.
[3] Anderson *v.* Weston, 8 Scott, 583.
[4] Saunderson *v.* Piper, 5 Bing. N. C. 425.
[5] Rex *v.* Elliott, 2 East, P. C. 951. But see Saunderson *v.* Piper, *supra*. See further, Norwich Bank *v.* Hyde, 13 Conn. 279; Boyd *v.* Brotherson, 10 Wend. 93. In Burnham *v.* Allen, 1 Gray, 496, a promissory note, expressed to be for "thee hundred dollars," and in figures in the margin, $300, was held to be a good note for three hundred dollars, if the maker, when he signed it, intended "thee" for "three;" and whether such was his intention, was a question for the jury.
[6] Storm *v.* Stirling, 3 El. & Bl. 832; per *Eyre*, C. B., in Gibson *v.* Minet, 1 H. Bl. 608. But if it can be gathered from the instrument, by a reasonable or necessary intendment, who is the payee, it will be sufficient. Thus, in Green *v.* Davies, 4 B. & Cr. 235, an instrument in the following form: "Received of A. B. £100, which I promise to pay on demand, with lawful interest," was held to be a promissory note.
[7] Mead *v.* Young, 4 T. R. 28.
[8] Willis *v.* Barrett, 2 Stark. 29.
[9] Sweeting *v.* Fowler, 1 Stark. 106.
[10] Storm *v.* Stirling, 3 El. & Bl. 832.

drawer indorse it with the fictitious name, the acceptor is not liable thereon to the holder, unless at the time of the acceptance he knew the name to be fictitious.[1] In that case, the bill may be declared on as payable to bearer;[2] or the amount may be recovered on the money counts;[3] as it may if the acceptor did not know the name to be fictitious, but had the money of the holder in his hands.[4] A note to a fictitious payee, with his name indorsed by the maker, would undoubtedly be held to be the maker's own note, either payable to bearer, or to himself, or order, by another name, and so indorsed.[5] If a blank be left in a bill for the payee's name, a *bonâ fide* holder may fill it with his own, the issuing of the bill in blank being an authority to a *bonâ fide* holder to insert the name.[6] And if the name of the payee be not the name of a person, as if it be the name of a ship, the instrument is payable to bearer.[7] A note payable to "A, or B, or C," is not a good promissory note.[8] A bill or note "to the order of" the plaintiff, is the same as if to him "or his order," and may be sued by him without indorsement.[9]

3. *Of ambiguous and irregular instruments.* — The law in relation to protest and damages makes it sometimes important to distinguish between a promissory note and a bill of exchange. The rule in general is, that, if an instrument be so ambiguous in its terms that it cannot be certainly pronounced one of these to the exclusion of the other, the holder may elect and treat it as either.[10] As if written, "value received, in three months from date, pay the order of H. L., $500. Signed A B;" and an address or memorandum at the bottom, "At Messrs. E. F. & Co."[11] It has been held that an indorsement upon a bond, ordering the contents to be paid to A or order, for value received, is a good bill.[12] So also, a direction to pay the amount of a promis-

[1] Bennett *v.* Farnell, 1 Campb. 130, 180; Gibson *v.* Minet, 1 H. Bl. 569.
[2] Gibson *v.* Minet, *supra.*
[3] Tatlock *v.* Harris, 3 T. R. 174.
[4] Bennett *v.* Farnell, 1 Campb. 130.
[5] Plets *v.* Johnson, 3 Hill, 112. And see cases cited *supra.*
[6] Cruchley *v.* Clarance, 2 M. & S. 90; Crutchley *v.* Mann, 5 Taunt. 529; Attwood *v.* Griffin, Ry. & M. 425.
[7] Grant *v.* Vaughan, 3 Burr. 1528.
[8] Blanckenhagen *v.* Blundell, 2 B. & Ald. 417.
[9] Smith *v.* M'Clure, 5 East, 476.
[10] Edis *v.* Bury, 6 B. & Cr. 433; Lloyd *v.* Oliver, 12 E. L. & Eq. 424.
[11] Shuttleworth *v.* Stephens, 1 Campb. 407. [12] Bay *v.* Freazer, 1 Bay, 66.

sory note, written under the same by the promisor; so that the person directed, if he accepts, is liable as acceptor of a bill.[1] So, where a certificate of deposit in a bank, payable on a future day to the order of A, was indorsed for value to B by A, it was held that the indorsement constituted a bill of exchange.[2] An agreement in the instrument itself to give further security, would avoid it as a promissory note or bill;[3] but not, as it seems, a statement that security has been given.[4]

4. *Of bank-notes.* — Bank-notes, or bank-bills, are promissory notes of the bank, payable to bearer; and, like all notes to bearer, the property in them passes by delivery. They are intended to be used as money; and, while a finder, or one who steals them, has no title himself against the owner, still, if he passes them away to a *bonâ fide* holder, that is, a holder for value without notice or knowledge, such owner holds them against the original owner.[5] And if the bank pays them in good faith on regular presentment, the owner has no claim.[6] They pass by a will bequeathing money.[7] They are a good tender, unless objected to at the time because not money.[8] Forged bills, given in payment, are a mere nullity.[9] Bills of a bank which has failed, but of which the failure is unknown to both parties, are now, generally, put on the footing of forged or void bills; although there is some conflict on this subject.[10] But if the receiver of them, by holding them, and by a delay of returning or giving them up, injures the payer and impairs his opportunity or means of indemnity, the receiver must then lose them.[11]

5. *Of checks on banks.* — A check on a bank is undoubtedly a bill of exchange; but usage and the nature of the case have in-

[1] Leonard *v.* Mason, 1 Wend. 522.
[2] Kilgore *v.* Bulkley, 14 Conn. 362.
[3] See Byles on Bills, 9.
[4] Wise *v.* Charlton, 4 Ad. & El. 786.
[5] Miller *v.* Race, 1 Burr. 452.
[6] Id.
[7] Fleming *v.* Brook, 1 Sch. & Lef. 318; Stuart *v.* The Marquis of Bute, 11 Ves. 662.
[8] Snow *v.* Perry, 9 Pick. 542; Wheeler *v.* Kraggs, 8 Ohio, 169; Warren *v.* Mains, 7 Johns. 476; Noe *v.* Hodges, 3 Humph. 162; Seawell *v.* Henry, 6 Ala. 226; Hoyt *v.* Byrnes, 2 Fairf. 475; Polglass *v.* Oliver, 2 Cr. & J. 15.
[9] United States Bank *v.* Bank of Georgia, 10 Wheat. 333; Thomas *v.* Todd, 6 Hill, 340; Simms *v.* Clarke, 11 Ill. 137; Ramsdale *v.* Horton, 3 Penn. St. 330; Keene *v.* Thompson, 4 Gill & Johns. 463.
[10] Wainwright *v.* Webster, 11 Vt. 576; Fogg *v.* Sawyer, 9 N. H. 365; Lightbody *v.* Ontario Bank, 11 Wend. 1, 13 id. 101; Frontier Bank *v.* Morse, 22 Maine, 88; Timmis *v.* Gibbins, 14 Eng. Law and Eq. 64.
[11] Pindall *v.* The Northwestern Bank, 7 Leigh, 617; Simms *v.* Clarke, 11 Ill. 137.

troduced some important qualifications of the general law of bills, as applicable to checks.[1] A check has no days of grace, and requires no acceptance, because a banker, after a customary or reasonable time has elapsed since deposit, is bound to pay the checks of the depositors.[2] The drawer of a check is not a surety as is the drawer of a bill, but a principal debtor, like the maker of a note.[3] Nor can a drawer complain of any delay whatever in the presentment; for it is an absolute appropriation to the holder of so much money in the banker's hands; there it may lie at the holder's pleasure.[4] But delay is at the holder's risk; for, if the bank fails after he could have got his money on the check, the loss is his.[5] An acceptance of the drawers, payable at the bank, and paid by the bank, if it exhaust the drawers' funds so that none are left for his check, is a good defence to an action against the bank for non-payment of the check.[6]

If one who holds a check as payee, or otherwise, transfers it to another, he has a right to insist that the check should be presented in the course of the banking hours of that day and the next.[7] And if the party receiving the check live elsewhere than where the bank is, it seems that he should send it for collection the next day; and if to an agent, the agent should present it in the course of the day after he receives it.[8] If the check be drawn when the drawer neither has funds in the bank, nor has made any arrangement by which he has a right to draw the check, the drawing it is a fraud, and the holder may bring his action at once against the drawer, without presentment or notice.[9]

Checks are seldom accepted. But they are often marked by the bank as good; and it is said that this binds the bank as an acceptor.[10] And from the nature of a check, and the use to which it is applied, it has been inferred that if a check be drawn for

[1] See Chapman *v.* White, 2 Seld. 412; Bowen *v.* Newell, 4 id. 190; In the Matter of Brown, 2 Story, 502; Harker *v.* Anderson, 21 Wend. 372.
[2] In the Matter of Brown, 2 Story, 502; Harker *v.* Anderson, 21 Wend. 372.
[3] 3 Kent's Com. 104, n. (*c.*)
[4] Little *v.* Phœnix Bank, 2 Hill, 425; In the Matter of Brown, 2 Story, 502; 3 Kent's Com. *ut. sup.*, Robinson *v.* Hawksford, 9 Q. B. 52.
[5] Id.
[6] Kymer *v.* Laurie, 13 L. J. Q. B. 426.
[7] Rickford *v.* Ridge, 2 Campb. 537; Boddington *v.* Schlencker, 4 B. & Ad. 752; Moule *v.* Brown, 4 Bing. N. C. 266.
[8] Rickford *v.* Ridge, 2 Campb. 537; Moule *v.* Brown, 4 Bing. N. C. 266.
[9] De Berdt *v.* Atkinson, 2 H. Bl. 336; Terry *v.* Parker, 6 Ad. & El. 502; Kinsley *v.* Robinson, 21 Pick. 327; Foard *v.* Womack, 2 Ala. 368.
[10] Robson *v.* Bennett, 2 Taunt. 388.

value against funds, and the drawer afterwards order the bank to refuse payment of it, and while the bank has still the funds of the drawer in its hands, it receives notice of the check and a demand of its contents, the bank should be bound to pay it and entitled to appropriate to the payment the necessary amount from the funds of the drawer. But this would be contrary to the general law of bills of exchange, which certainly do not operate as an absolute appropriation of the funds in the hands of the acceptor, until after his acceptance.

Checks are usually payable to bearer; but may be and often are drawn payable to a payee or his order; for this guards against loss or theft, and gives to the drawer, when the check is paid, the receipt of the payee. Generally, a check is not payment until it is cashed;[1] but then it is payment; to make it so, however, it must be shown that the money was paid to the creditor, or that the check passed through his hands.[2] A bank cannot maintain a claim for money lent and advanced, merely by showing the defendant's check paid by them, because the general presumption is, that the bank paid the check because drawn by a depositor against funds.[3]

It is said that, while the death of a drawer countermands his check, if the bank pay it before notice of the death reaches them, they are discharged.[4] This would seem to be almost a necessary inference from the general purpose of banks of deposit, and the use which merchants make of them.

If a bank pay a forged check, it is so far its own loss, that the bank cannot charge the money to the depositor whose name was forged. And it has lately been decided in New Jersey, that the bank cannot recover the money back from a *bonâ fide* holder to whom they pay it.[5] So, if it pay a check of which the amount has been falsely and fraudulently increased, it can charge the drawer only with the original amount.[6] But it seems that if the drawer himself caused or facilitated the forgery, so that it may be called his fault, and the bank is wholly innocent, then the loss falls on the drawer.[7] If many persons, not partners, join in a

[1] Pearce *v.* Davis, 1 M. & Rob. 365; The People *v.* Baker, 20 Wend. 602.
[2] Egg *v.* Barnett, 3 Esp. 196; Mountford *v.* Harper, 16 M. & W. 825.
[3] Fletcher *v.* Manning, 12 M. & W. 571.
[4] Tate *v.* Hilbert, 2 Ves. Jr. 111.
[5] Burlington County Bank *v.* Miller, Legal Intelligencer, Phila. Feb. 8, 1856.
[6] Hall *v.* Fuller, 5 B. & Cr. 750; Smith *v.* Mercer, 6 Taunt. 76.
[7] Young *v.* Grote, 4 Bing. 253.

deposit, they must join in a check; but if one or more abscond, equity will relieve the remainder.[1]

6. *Of accommodation paper.* — An accommodation bill or note is one for which the acceptor or maker has received no consideration, but has lent his name and credit to accommodate the drawer, payee, or holder. Of course, he is bound to all other parties, precisely as if there were a good consideration; for, otherwise, it would not be an effectual loan of credit. But he is not bound to the party whom he thus accommodates; on the contrary, that party is bound to take up the paper or provide the accommodation acceptor, or maker, or indorser, with funds for doing it, or indemnify him for taking it up. And if, before the bill or note is due, the party accommodated provides the party lending his credit with the necessary funds, he cannot recall them; and if he becomes bankrupt, they remain the property of the accommodation acceptor or maker.[2] And if sued on the bill or note, he can charge the party accommodated with the expense of defending the suit,[3] unless it was evident and certain that he had no defence.[4]

7. *Of foreign and inland bills.* — Bills of exchange may be foreign bills, or inland bills. Foreign bills are those which are drawn or payable in a foreign country; and for this purpose, each of our States is foreign to the others.[5] Inland bills are drawn and payable at home. Every bill is, *primâ facie*, an inland bill, unless it purports to be a foreign bill.[6] If foreign on its face, evidence is admissible to show that it was drawn at home. In England, this evidence has been admitted to make the bill void for want of a stamp.[7] If a bill be drawn and accepted here, but afterwards actually signed by the drawer abroad, it is a foreign bill.[8] If a foreign bill be not accepted, or be not paid at

[1] *Ex parte* Hunter, 2 Rose, 363; *Ex parte* Collins, 2 Cox, 427.
[2] Morse *v.* Williams, 3 Campb. 418; Wilkins *v.* Casey, 7 T. R. 711; Willis *v.* Freeman, 12 East, 656.
[3] Jones *v.* Brooke, 4 Taunt. 464; Stratton *v.* Mathews, 3 Exch. 48; Garrard *v.* Cottrell, 10 Q. B. 679.
[4] Roach *v.* Thompson, M. & Malk. 487; Beech *v.* Jones, 5 C. B. 696; Byles on Bills, 323.
[5] Buckner *v.* Finley, 2 Pet. 586.
[6] Armani *v.* Castrique, 13 M. & W. 443.
[7] Steadman *v.* Duhamel, 1 C. B. 888.
[8] Snaith *v.* Mingay, 1 M. & Selw. 87.

maturity, it should at once be protested by a notary-public. Inland bills are generally, and promissory notes frequently, protested; but it cannot be said that this is required by the law-merchant.[1] The holder of a foreign bill, after protest for non-payment, or for non-acceptance, may sue the drawer and indorser, and recover the face of the bill, and, in addition thereto, his costs of protest and notice, his commissions and reëxchange, or whatever it may cost him to redraw, by reason of the current rate of exchange.[2] But these damages on protest are generally adjusted in this country by various statutes, — which give greater damages as the distance is greater; and an established usage would supply the place of statutes if they were wanting.[3]

8. *Of the law of place.* — Important questions sometimes arise in the case of foreign bills, dependent upon the *lex loci;* some of which are not yet settled. In general, every contract is to be governed by the law of the place where it is made.[4] Thus, if a bill is drawn in France, and there indorsed in a way which is

[1] Windle *v.* Andrews, 2 B. & Ald. 696.

[2] Mellish *v.* Simeon, 2 H. Bl. 378; Graves *v.* Dash, 12 Johns. 17; Denston *v.* Henderson, 13 id. 322; Grimshaw *v.* Bender, 6 Mass. 157; De Tastet *v.* Baring, 11 East, 265. In this last case, the nature of reëxchange was thus stated and explained by counsel, *arguendo:* "A merchant in London draws on his debtor in Lisbon a bill in favor of another for so much in currency of Portugal, for which he receives the corresponding value at the time in English currency; and that corresponding value fluctuates from time to time, according to the greater or lesser demand there may be in the London market for bills on Lisbon, and the facility of obtaining them; the difference of that value constitutes the rate of exchange on Lisbon. The like circumstances and considerations take place at Lisbon, and constitute in like manner the rate of exchange on London. When the holder, therefore, of a London bill drawn on Lisbon, is refused payment of it in Lisbon, the actual loss which he sustains is not the identical sum which he gave for the bill in London, but the amount of its contents if paid at Lisbon, where it was due, and the sum which it will cost him to replace that amount upon the spot by a bill upon London, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge for reëxchange. And it is quite immaterial whether or not he in fact redraws such a bill on London, and raises the money upon it in the Lisbon market; his loss by the dishonor of the London bill is exactly the same, and cannot depend on the circumstance whether he repay himself immediately by redrawing for the amount of the former bill, with the addition of the charges upon it, including the amount of the reëxchange, if unfavorable to this country at the time, — or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here; but that party is at all events liable to him for the difference; for, as soon as the bill was dishonored, the holder was entitled to redraw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market or exchange afterwards; for, as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavorable to England before he redrew, so neither could the party here fairly insist on having the advantage if the exchange happened to be more favorable when the bill was actually drawn."

[3] See 3 Kent, Com. 115, *et seq.*

[4] Carnegie *v.* Morrison, 2 Met. 381, 397.

sufficient here, but insufficient there, the indorsement would here be held void.[1] But if a contract entered into in one place, is to be performed in another, as in the case of a note dated, or a bill drawn in one State, but payable in another, the prevailing rule is, that the law of the place where the note is payable, construes and governs the contract.[2] Therefore, if a bill be drawn in England, payable in France, the protest and notice of dishonor must be regulated by the law of France.[3] But one who makes such a note, may, as we think, elect for many purposes, which law shall govern it. Thus, if he makes it in New York, and it is payable in Boston, he may promise to pay the legal interest of New York, and will be bound to this payment in Boston, although the legal interest there is one per cent. less;[4] but if there be no such express promise, the interest payable will be that of the place where the note is payable.

While the law of the place of the contract interprets and construes it, the law of the place where it is put in suit — the *lex fori* — determines all questions as to remedy.[5] Thus, in general, the statutes of limitation of the place of the forum are applied;[6] it has been doubted, however, whether, if the statutes of limitation of the place where the note is made, *discharge* the maker, they do not operate as a release everywhere.[7] And if a cause of

[1] Trimbey *v.* Vignier, 1 Bing. N. C. 151.

[2] Robinson *v.* Bland, 2 Burr. 1077; Le Breton *v.* Miles, 8 Paige, 261; Fanning *v.* Consequa, 17 Johns. 511; Andrews *v.* Pond, 13 Pet. 65.

[3] Rothschild *v.* Currie, 1 Q. B. 43.

[4] Depau *v.* Humphreys, 20 Martin, 1; Pecks *v.* Mayo, 14 Vt. 33; Chapman *v.* Robertson, 6 Paige, 627.

[5] Van Reimsdyk *v.* Kane, 1 Gall. 371.

[6] British Linen Co. *v.* Drummond, 10 B. & Cr. 903; Le Roy *v.* Crowninshield, 2 Mason, 151; Nash *v.* Tupper, 1 Caines, 402; Bank of United States *v.* Donnally, 8 Pet. 361; Ruggles *v.* Keeler, 3 Johns. 263; Byrne *v.* Crowninshield, 17 Mass. 55.

[7] Mr. Justice *Story*, in his Conflict of Laws, § 582, says: "Suppose the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period, and the parties are resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case; under such circumstances, the question might properly arise whether such statutes of limitation or prescription may not afterwards be set up in any other country to which the parties may remove, by way of extinguishment or transfer of the claim or title. This is a point which does not seem to have received as much consideration in the decisions of the common law as it would seem to require." And in Don *v.* Lippmann, 5 Cl. & Fin. 16, Lord *Brougham* speaks of this as an excellent distinction. And it is approved of by *Tindal*, C. J., in Huber *v.* Steiner, 2 Bing. N. C. 202. But in Bulger *v.* Roche, 11 Pick. 36, where a debt was contracted in a foreign country, between subjects thereof, who remained there until the debt became barred by the law of limitations of such country, it was held that such debt could be recovered in Massachusetts, in an action brought within six years after the parties came into that commonwealth. And *Shaw*, C. J., said: "Whether a law of prescription or statute of limitation, which takes away

action, relating to any special subject-matter which has a situs, be barred by a statute of limitations where the subject-matter is situated, it is barred everywhere.[1] A promisor, not subject to arrest in the country where the note is made, may be arrested under the laws of the country where the note is sued.[2]

It will always be presumed, in the absence of testimony, that the law of a foreign country is the same with that of the country in which the suit is brought. If a difference in this respect is a ground of defence, or of action, it must be proved.[3]

SECTION III.

OF THE CONSIDERATION.

1. *Exception to the common law rule, in the case of negotiable paper.* — By the common law of England and of this country, as we have seen, no promise can be enforced, unless made for a consideration, or unless it be sealed. But bills and notes pay-

every legal mode of recovering a debt, shall be considered as affecting the contract like payment, release, or judgment, which in effect extinguish the contract, or whether they are to be considered as effecting the remedy only by determining the time within which a particular mode of enforcing it shall be pursued, were it an open question, might be one of some difficulty. It was ably discussed, upon general principles, in a late case, (Le Roy *v.* Crowninshield, 2 Mason's Rep. 151,) before the Circuit Court, in which, however, it was fully conceded by the learned judge, upon a full consideration and review of all authorities, that it is now to be considered a settled question. A doubt was intimated in that case, whether, if the parties had remained subjects of the foreign country until the term of limitation had expired, so that the plaintiff's remedy would have been extinguished there, such a state of facts would not have presented a stronger case, and one of more serious difficulty. Such was the case in the present instance; but we think it sufficient to advert to a well-settled rule in the construction of the statute of limitations, to show that this circumstance can make no difference. The rule is this, that where the statute has begun to run, it will continue to run, notwithstanding the intervention of any impediment, which, if it had existed when the cause of action accrued, would have prevented the operation of the statute. For instance, if this action accrued in Nova Scotia in 1821, and the plaintiff or defendant had left that country in 1825, (within six years,) in 1828, after the lapse of six years, the action would be as effectually barred, and the remedy extinguished there, as if both had continued to reside in Halifax down to the same period. So that, when the parties met here in 1829, so far as the laws of that country, by taking away all legal remedy, could effect it, the debt was extinguished, and that equally whether they had both remained under the jurisdiction of these laws till the time of limitation had elapsed, or whether either or both had previously left it. The authorities referred to, therefore, must be held applicable to a case where both parties were subject to the jurisdiction of a foreign State when the bar arising from its statute of limitations, attached."

[1] Beckford *v.* Wade, 17 Ves. 87; Shelby *v.* Guy, 11 Wheat. 361.

[2] De La Vega *v.* Vianna, 1 B. & Ad. 284; Imlay *v.* Ellepsen, 2 East, 453; Peck *v.* Hozier, 14 Johns. 346; Hinkley *v.* Marcan, 3 Mason, 88; Titus *v.* Hobart, 5 id. 378; Smith *v.* Spinolla, 2 Johns. 198.

[3] Sherrill *v.* Hopkins, 1 Cow. 103; Legg *v.* Legg, 8 Mass. 99; Holmes *v.* Broughton, 10 Wend. 75.

able to order, that is, negotiable, are, to a certain extent, an exception to this rule. Thus, an indorsee cannot be defeated by the promisor showing that he received no consideration for his promise;[1] because he made an instrument for circulation as money; and it would be fraudulent to give to paper the credit of his name, and then refuse to honor it. But as between the maker and the payee, or between indorser and indorsee, and, in general, between any two *immediate* parties, the defendant may rely on the want of consideration.[2] So, if a distant indorsee has notice or knowledge, when he buys a note, that it was made without consideration, he cannot recover on it against the maker, unless it was an accommodation note, or was intended as a gift.[3] Thus, if A, supposing a balance due from him to B, gives B his negotiable note for the amount, and afterwards discovers that the balance is the other way, B cannot recover of A; nor can any third or more distant party who knows these facts before buying the note. But if A gives B his note wholly without consideration, for the purpose of lending him his credit, or for the purpose of making him a gift to the amount of the note, and C buys the note with a full knowledge of the facts, he will nevertheless hold A, although B could not. But it is said that if C paid for the note less than its face, he can recover of A no more than he paid.[4] Every promissory note imports a consideration, and none need be proved unless to rebut evidence of want of consideration.[5]

If an indorser shows that the note was originally made in fraud, he may require the holder to prove consideration.[6] And if an accommodation note be discounted in violation of the agreement of the party accommodated, the holder cannot recover, unless he received the note in good faith and for valuable consideration.[7]

[1] Robinson *v.* Reynolds, 2 Q. B. 196; Hunter *v.* Wilson, 4 Exch. 489; Collins *v.* Martin, 1 B. & P. 648.

[2] Puget De Bras *v.* Forbes, 1 Esp. 117; Jackson *v.* Warwick, 7 T. R. 121; Jefferies *v.* Austin, 1 Str. 674.

[3] Smith *v.* Knox, 3 Esp. 46; Charles *v.* Marsden, 1 Taunt. 224; Fentum *v.* Pocock, 5 id. 192.

[4] Wiffen *v.* Roberts, 1 Esp. 261; Jones *v.* Hibbert, 2 Stark. 304; Nash *v.* Brown, Chitty on Bills, 74, n.

[5] Middlebury *v.* Case, 6 Vt. 165; Horn *v.* Fuller, 6 N. H. 511; Goshen Turnpike Co. *v.* Hurtin, 9 Johns. 217; Camp *v.* Tompkins, 9 Conn. 545; Mandeville *v.* Welch, 5 Wheat. 277.

[6] Bailey *v.* Bidwell, 13 M. & W. 73; Smith *v.* Braine, 16 Q. B. 244; Harvey *v.* Towers, 6 Exch. 656; Fitch *v.* Jones, 1 Jur. N. S. 854.

[7] Lewis *v.* Parker, 4 Ad. & El. 838.

2. *Of "value received."*— "Value received" is usually written; but it need not be so.[1] If not, it will be presumed, or may be supplied by the plaintiff's proof. If expressed, it may be denied by the defendant, and disproved. And if a special consideration be stated in the note, and in the declaration, the defendant may prove that there was no consideration, or that the consideration was different.[2] If "value received" be written in a note, it means received by the maker of the payee;[3] if the note be payable to bearer, it means received by the maker of the holder. In a bill, this phrase means that the value was received of the payee by the drawer.[4] But if the bill be payable to the drawer's own order, then it means received by the acceptor of the drawer.[5]

3. *What the consideration may be.* — A valuable consideration may be either any gain or advantage to the promisor, or any loss or injury sustained by the promisee at the promisor's request.[6] A previous debt, or a fluctuating balance, or a debt due from a third person, might be a valuable consideration.[7] So is a *moral* consideration, if founded upon a previous legal consideration; as, where one promises to pay a debt barred by the statute of limitations, or by infancy.[8] But a merely moral consideration, as one founded upon natural love and affection or the relation

[1] White *v.* Ledwick, Bayley on Bills, 2 Am. ed. p. 33, 4 Doug. 247; Grant *v.* Da Costa, 3 M. & S. 352; Hatch *v.* Trayes, 11 Ad. & El. 702; Townsend *v.* Derby, 3 Met. 363.

[2] Abbott *v.* Hendricks, 1 M. & Gr. 791; Fox *v.* Frith, 1 Car. & Marsh. 502.

[3] Clayton *v.* Gosling, 5 B. & Cr. 360.

[4] Grant *v.* Da Costa, 3 M. & S. 351. In this case, a question was made whether the words "value received," in a bill, mean value received by the drawer of the payee, or value received by the drawee of the drawer. And Lord *Ellenborough* said: "It appears to me that 'value received' is capable of two interpretations, but the more natural one is, that the party who draws the bill should inform the drawee of a fact which he does not know, than of one of which he must be well aware. The words 'value received' are not at all material, they might be wholly omitted in the declaration, and there are several cases to that effect. The meaning of them here is, that the drawer informs the drawee that he draws upon him in favor of the payee, because he has received value of such payee. To tell him that he draws upon him because he, the drawee, has value in his hands, is to tell him nothing; therefore the first is the more probable interpretation." And *Bayley*, J., said: "The object of inserting the words 'value received,' is to show that it is not an accommodation bill, but made on a valuable consideration given for it by the payee."

[5] Highmore *v.* Primrose, 5 M. & S. 65.

[6] See *ante*, pp. 27, 28, and notes.

[7] Percival *v.* Frampton, 2 Cr. M. & Ros. 180; Pease *v.* Hirst, 10 B. & Cr. 122; Poplewell *v.* Wilson, 1 Strange, 264; Baker *v.* Walker, 14 M. & W. 465.

[8] Dodge *v.* Adams, 19 Pick. 429; Ehle *v.* Judson, 24 Wend. 97; Warren *v.* Whitney, 24 Maine, 561; Geer *v.* Archer, 2 Barb. 420.

of parent and child, is no legal consideration.[1] No consideration is sufficient in law if it be *illegal* in its nature; and it may be illegal because, first, it violates some positive law, as, for example, the Sunday law, or the law against usury. Secondly, because it violates religion or morality, as an agreement for future illicit cohabitation, or to let lodgings for purposes of prostitution, or an indecent wager; for, any bill or note founded upon either of these, would be void.[2] Thirdly, if distinctly opposed to public policy; as an agreement in restraint of trade, or injurious to the revenue, or in restraint of marriage, or for procurement of marriage, or suppressing evidence, or withdrawing a prosecution for felony or public misdemeanor.[3] But one who sells goods, only *knowing* that an illegal use is to be made, without any personal aid in the illegal purpose, may, it seems, recover the price of them.[4]

SECTION IV.

OF THE RIGHTS AND DUTIES OF THE MAKER.

The maker of a note and the acceptor of a bill is bound to pay the same at its maturity, and at any time thereafter, unless the action be barred by the statute of limitations, or he has some other defence under the general law of contracts. As between himself and the payee of the note or bill, he may make any defences which he could make on any debt arising from simple contract; as want or failure of consideration; payment, in whole or in part; set-off; accord and satisfaction, or the like. The peculiar characteristics of negotiable paper do not begin to operate, so to speak, until the paper has passed into the hands of third parties. Then, the party liable on the note or bill can make none of these defences, unless the time or manner in which it came into the possession of the holder, lays him open to these defences. But the law on this subject may better be presented in our next section.

[1] Smith *v.* Kittridge, 21 Vt. 238.
[2] Walker *v.* Perkins, 3 Burr. 1568; Girarday *v.* Richardson, 1 Esp. 13; Da Costa *v.* Jones, Cowp. 729; Ditchburn *v.* Goldsmith, 4 Campb. 152.
[3] Mitchel *v.* Reynolds, 1 P. Wms. 181; Lowe *v.* Peers, 4 Burr. 2225; Biggs *v.* Lawrence, 3 T. R. 454.
[4] Hodgson *v.* Temple, 5 Taunt. 181.

SECTION V.

OF THE RIGHTS AND DUTIES OF THE HOLDER OF NEGOTIABLE PAPER.

1. *What a holder may do with a bill or note.* — An indorsee has a right of action against all whose names are on the bill when he received it. And if one delivers a bill or note which he ought to indorse and does not, the holder has an action against him for not indorsing,[1] or may proceed in equity, to oblige him to indorse.[2] If a bill come back to a previous indorser, he may strike out the intermediate indorsements and sue in his own name, as indorsee; but he has, in general, no remedy against the intermediate parties;[3] if, however, the circumstances are such that *they* would have no right against him as an indorser to them, if they were compelled to pay, then he may, perhaps, have a claim against them.[4] And it seems now to be settled that an indorser who comes again into possession of the note or bill, is to be taken, merely on the evidence of his possession, as the holder and proprietor of the bill, unless the contrary is made to appear.[5]

[1] Rose *v.* Sims, 1 B. & Ad. 521.

[2] Thus, in Watkins *v.* Maule, 2 Jac. & Walk. 237, Sir Thomas *Plumer* said: "When a note is handed over for valuable consideration, the indorsement is a mere form; the transfer for consideration is the substance; it creates an equitable right, and entitles the party to call for the form. The other is bound to do that formal act, in order to substantiate the right of the party to whom he has transferred it." And see Smith *v.* Pickering, Peake, 50; *Ex parte* Rhodes, 3 Mont. & Ayr. 217; *Ex parte* Greening, 13 Ves. 206.

[3] The reason is that such intermediate parties would have their remedy over against him. Byles on Bills, 114; Bishop *v.* Hayward, 4 T. R. 470; Britten *v.* Webb, 2 B. & Cr. 483.

[4] Wilders *v.* Stevens, 15 M. & W. 208. And Bishop *v.* Hayward, *supra*. There, A having declared against B on a promissory note made by C to A, by him indorsed to B, and by B again indorsed to A, and having obtained a verdict, the judgment was arrested. But Lord *Kenyon*, in delivering his opinion, said: "I do not say but that there may be circumstances which, if disclosed on the record, might entitle the plaintiff to recover against the defendant on this note; but we are now called upon to form a judgment on the title which he has disclosed." And see further, Williams *v.* Clarke, 16 M. & W. 834; Smith *v.* Marsack, 6 C. B. 486; Morris *v.* Walker, 15 Q. B. 589.

[5] It was so held by the Supreme Court of the United States, in Dugan *v.* United States, 3 Wheat. 172. *Livingston*, J., in delivering the opinion of the court, said: "After an examination of the cases on this subject, (which cannot all of them be reconciled,) the court is of opinion that, if any person who indorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bonâ fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him,

The holder of a bill indorsed and deposited with him for collection, or only as a trustee, can use it only in conformity with the trust.[1] And if the indorsement express that it is to be collected for the indorser's use, or use any equivalent language, this is notice to any one who discounts it; and the party discounting against this notice, will be obliged to deliver the note, or pay its contents if collected, to the indorser.[2]

2. *Of a transfer after dishonor of negotiable paper.* — A holder who took the note after it became due, is open to any defence which could have been made against the party from whom he took it; because he necessarily has notice that the bill or note is dishonored, and should ascertain whether any, and if so, what defence is set up.[3] So, too, if he takes the note or bill before it is due, but with notice or knowledge of fraud or other good defence, that defence may be made against him. Otherwise, no defence can be made against one who becomes an indorsee for consideration, which does not spring out of the relations between himself and the defendant.[4] Nor is an indorsee liable to such defences as arise out of collateral matters; but only to those which attach to the note or bill itself. Hence, it is said he is not liable to a set-off between the original payee and the maker.[5] Nor is

without producing any receipt or indorsement back from either of such indorsers, whose names he may strike from the bill or not, as he may think proper." And see, to the same effect, Green *v.* Jackson, 15 Maine, 136; Eaton *v.* McKown, 34 Maine, 510; Earbee *v.* Wolfe, 9 Porter, 366; Bond *v.* Storrs, 13 Conn. 412.

[1] Goggerley *v.* Cuthbert, 5 B. & P. 170; Evans *v.* Kymer, 1 B. & Ad. 528.

[2] Thus, in Treuttel *v.* Barandon, 8 Taunt. 100, a bill was indorsed by the payee in this form: "Pay A B, or order, for the account of C D." A B pledged it with the defendant, who advanced money upon it to A B personally. *Held*, that the defendant had sufficient notice, from the indorsement, that A B had no authority to raise money on the bill for his own benefit, and therefore could not defend an action of trover for the bill, brought by C D. So, in Sigourney *v.* Lloyd, 8 B. & Cr. 622, 5 Bing. 525, where the plaintiff, a merchant in Boston, remitted a bill to B, his agent in London, indorsing it in this form: "Pay B, or his order, for my use;" and B discounted the bill with his bankers, and afterwards failed, and the bankers, to whom he was indebted in more than the amount of the bill, received payment of it at maturity from the acceptors; it was held that the bankers were liable to the plaintiff in an action for money had and received. And see Snee *v.* Prescot, 1 Atk. 245; Edie *v.* The East India Co. 2 Burr. 1227; Ancher *v.* The Bank of England, Doug. 637.

[3] Brown *v.* Davies, 3 T. R. 80; Boehm *v.* Sterling, 7 id. 423; Tinson *v.* Francis, 1 Campb. 19. In this last case, Lord *Ellenborough* said: "After a bill or note is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be incumbered."

[4] Brown *v.* Davies, 3 T. R. 82.

[5] This is well settled in England. The point was first decided in Burrough *v.* Moss, 10 B. & Cr. 558. That was an action on a promissory note made by the defendant, payable to one Fearn, and by him indorsed to the plaintiff after it became due. For

the mere want of consideration between payee and maker one of those equities to which a holder for value after dishonor, even with notice, is liable, provided the bill or note was originally intended to be without consideration, as in the case of an accommodation bill or note, or one intended as a gift.[1] But it seems that, if a bill be delivered as security for a balance on a running account, and, when it becomes due, the balance is in favor of the depositor who does not withdraw the bill, and afterwards the balance becomes against the depositor, the holder may not only hold it to secure the balance, but will not be regarded as the transferee of an overdue bill.[2] And in the absence of any evidence on the point, the presumption of law is, that the bill was transferred before maturity.[3] And a promissory note payable on demand, is considered as intended to be a continuing security, and therefore as not overdue, unless very old, without some evidence of demand of payment and refusal.[4] But it is not so with a check; for this should be presented without unreasonable delay,

the defendant, it was insisted that he had a right to set off against the plaintiff's claim a debt due to him from Fearn, who held the note at the time when it became due. But *Bayley*, J., delivering the opinion of the court, said: "The impression on my mind was, that the defendant was entitled to the set off; but, on discussion of the matter with my Lord *Tenterden* and my learned brothers, I agree with them in thinking that the indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters." And this decision has been uniformly adhered to in England. See Stein *v.* Yglesias, 1 Cr. M. & Ros. 565; Watkins *v.* Bensusan, 9 M. & W. 422; Whitehead *v.* Walker, 10 id. 696; Oulds *v.* Harrison, 10 Exch. 572. But in this country, there is no uniform rule. In some cases, it is regulated by statute. See 1 Parsons on Con. 214, n. (c).

[1] See *ante*, p. 97, and notes.

[2] Atwood *v.* Crowdie, 1 Stark. 483.

[3] Parkin *v.* Moon, 7 C. & P. 408; Lewis *v.* Parker, 4 Ad. & El. 838; Pinkerton *v.* Bailey, 8 Wend. 600; Burnham *v.* Wood, 8 N. H. 334; Burnham *v.* Webster, 19 Maine, 232; Ranger *v.* Cary, 1 Met. 369; Washburn *v.* Ramsdell, 17 Vt. 299.

[4] Thus, in Brooks *v.* Mitchell, 9 M. & W. 15, it was held that a promissory note, payable on demand, cannot be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest had been paid on it for several years before such indorsement. And *Parke*, B., said: "If a promissory note payable on demand, is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand, is intended to be a continuing security. It is quite unlike the case of a check, which is intended to be presented speedily." And see Barough *v.* White, 4 B. & Cr. 325; Cripps *v.* Davis, 12 M. & W. 165. But in this country, it is generally held that, if a note payable on demand, is negotiated a long time after it is made, it is to be regarded as a note overdue. See Furman *v.* Haskin, 2 Caines, 369; Hendricks *v.* Judah, 1 Johns. 319; Thurston *v.* M'Kown, 6 Mass. 428; Ayer *v.* Hutchins, 4 id. 370; Dennett *v.* Wyman, 13 Vt. 485; Camp *v.* Scott, 14 id. 387; Ranger *v.* Cary, 1 Met. 369; Wethey *v.* Andrews, 3 Hill, 582. There is, however, no precise time at which such a note is to be deemed dishonored; it must depend on the circumstances of the case, and the situation of the parties. Losee *v.* Dunkin, 7 Johns. 70; Sanford *v.* Mickles, 4 id. 224. And it is a question of law, and not of fact. Sylvester *v.* Crapo, 15 Pick. 93.

and, although a taker after one day's delay may not be affected, nor a taking after six days be held as conclusive evidence of negligence or fraud, yet, the jury may infer this.[1]

Sometimes a check is drawn by A in favor of C, on a bank in which C is a depositor. Then, generally, the bank will be held to have received the check as the agent of C, and, by giving him notice of the non-payment for want of funds, the bank will be discharged.[2] But it is said that, if, while the bank holds the check, the drawer deposits funds enough to pay it, the bank must appropriate these funds to that payment, although the drawer is indebted to the bank in a larger balance.[3]

If a holder sends back the bill or note as of no value to him, or for any such reason, his title dies and cannot be revived by his merely getting it back into his possession again, without a new transfer to him.[4]

It is most important to the holder of negotiable paper to know distinctly what his duties are in relation to presentment for acceptance or payment, and notice to others interested, in case of non-acceptance or non-payment.

3. *Of presentment for acceptance.* — It is always prudent for the holder of a bill to present it for acceptance without delay; for, if it be accepted, he has new security; if it be not, the former parties are immediately liable; and it is but just to the drawer to give him as early an opportunity as may be to withdraw his funds or obtain indemnity from a debtor who will not honor his bills. And if a bill is payable at sight, or at a certain period after sight, there is not only no right of action against anybody until presentment,[5] but, if this be delayed beyond a reasonable time, the holder loses his remedy against all previous parties.[6] And, although the question of reasonable time is generally one only of law, yet, in this connection it seems to be treated as a mixed question of law and fact, and as such given to the jury;[7]

[1] Down *v.* Halling, 4 B. & Cr. 330; Rothschild *v.* Corney, 9 id. 388.
[2] Boyd *v.* Emmerson, 2 Ad. & El. 184.
[3] Kilsby *v.* Williams, 5 B. & Ald. 815.
[4] Cartwright *v.* Williams, 2 Stark. 340.
[5] Holmes *v.* Kerrison, 2 Taunt. 323; Dixon *v.* Nuttall, 1 Cr. M. & Ros. 307.
[6] Robinson *v.* Ames, 20 Johns. 146; Wallace *v.* Agry, 4 Mason, 336, 5 id. 118; Aymar *v.* Beers, 7 Cow. 705.
[7] Muilman *v.* D'Eguino, 2 H. Bl. 565; Fry *v.* Hill, 7 Taunt. 397; Shute *v.* Robins, M. & Malk. 133; Mellish *v.* Rawdon, 9 Bing. 416; Straker *v.* Graham, 4 M. & W. 721. But see, *contrà*, Aymar *v.* Beers, 7 Cow. 705.

there is no certain rule in relation to what is reasonable time. If a bill be payable on demand, it is not like a promissory note, but must be presented within a reasonable time, or the drawer will be discharged.[1] If the holder puts a bill payable after sight, into circulation, a much larger delay in presentment would be allowed than if he kept it in his own possession.[2]

The presentment should be made during business hours; but it is said that in this country they extend through the day and until evening, excepting in the case of banks.[3] But a distinct usage would probably be received in evidence, and permitted to affect the question.

Ill health or other actual impediment without fault, may excuse delay on the part of the holder; but not the request of the drawer to the drawee not to accept.[4]

Presentment for acceptance should be made to the drawee himself, or to his agent authorized to accept.[5] And when it is presented, the drawee may have a reasonable time to consider whether he will accept, during which time the holder is justified in leaving the bill with him. And it seems that this time would be as much as twenty-four hours, unless, perhaps, the mail goes out before.[6] And if the holder gives more than twenty-four hours for this purpose, he should inform the previous parties of it.[7] If the drawee has changed his residence, the holder should use due diligence to find him; and what constitutes due or reasonable diligence, is a question of fact for a jury.[8] And if he

[1] Elting *v.* Brinkerhoff, 2 Hall, 459; Dumont *v.* Pope, 7 Blackf. 367. See, *ante*, p. 102, n. 4, and p. 103, n. 1.

[2] Muilman *v.* D'Eguino, 2 H. Bl. 565. In this case, *Buller*, J., said: "I think a rule may thus far be laid down as to laches, with regard to bills payable at sight or at a certain time after sight, namely, that they ought to be put in circulation. If they are circulated, the parties are known to the world, and their credit is looked to; and if a bill drawn at three days' sight, were kept out in that way for a year, I cannot say there would be laches." And see, to the same effect, Goupy *v.* Harden, 7 Taunt. 159.

[3] Cayuga County Bank *v.* Hunt, 2 Hill, 635.

[4] Hill *v.* Heap, Dowl. & Ryl. N. P. 57; Byles on Bills, 141.

[5] Therefore, where the holder's servant called at the drawee's residence, and showed the bill to some person in the drawee's tanyard, who refused to accept it, but the witness did not know the drawee's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so, it was held insufficient. Cheek *v.* Roper, 5 Esp. 175.

[6] Byles on Bills, 142; Ingram *v.* Foster, 2 Smith, 242.

[7] Ingram *v.* Foster, 2 Smith, 242.

[8] See Collins *v.* Butler, 2 Strange, 1087; Bateman *v.* Joseph, 12 East, 433. But it is well settled in this country that, if the drawee has removed out of the jurisdiction, the holder need not follow him. Anderson *v.* Drake, 14 Johns. 114; M'Gruder *v.* Bank of Washington, 9 Wheat. 598; Gillespie *v.* Hannahan, 4 McCord, 503; Reid *v.* Morri-

be dead, the holder should ascertain who is his personal representative, if he has one, and present the bill to him.[1] And in an action against the drawer, for non-acceptance, not only that, but presentment for acceptance should be alleged.[2] If the bill be drawn upon the drawee at a particular place, it is regarded as dishonored if the drawee has absconded so that the bill cannot be presented for acceptance.[3]

4. *Of presentment for demand of payment.* — The next question relates to the duty of demanding payment; and here the law is much the same in respect to notes and bills.

A demand is sufficient if made at the usual residence or place of business of the payer, of himself, or of an agent authorized to pay;[4] and this authority may be inferred from the habit of paying, especially in the case of a child, a wife, or a servant. The demand should not be made in the streets.[5] When made, the bill or note should be exhibited;[6] and if lost, a copy should be exhibited, although this does not seem absolutely necessary.[7] And when the payer calls on the holder, and declares to him that he shall not pay, and desires him to give notice to the indorsers, this constitutes demand and refusal, provided this declaration be made at the maturity of the paper; but not if it may be made before, because the payer may change his intention.[8]

Bankruptcy or insolvency of the payer is no excuse for non-demand;[9] although the shutting up of a bank, perhaps, may be regarded as a refusal to all their creditors, to pay their notes.[10] And absconding is a sufficient excuse;[11] but if the payer has

son, 2 W. & S. 401; Taylor *v.* Snyder, 3 Denio, 145. But in such case, the bill must be presented at the place of the drawee's former residence. Wheeler *v.* Field, 6 Met. 290.

[1] Gower *v.* Moore, 25 Maine, 16; Landry *v.* Stansbury, 10 Louis. 484.

[2] Mercer *v.* Southwell, 2 Show. 180.

[3] Anonymous, 1 Ld. Raym. 743; Putnam *v.* Sullivan, 4 Mass. 45; Gilbert *v.* Dennis, 3 Met. 495, 499, per *Shaw*, C. J.; Lehman *v.* Jones, 1 W. & S. 126. And see *ante*, p. 104, n. 8.

[4] Brown *v.* M'Dermot, 5 Esp. 265.

[5] King *v.* Holmes, 11 Penn. St. 456.

[6] Freeman *v.* Boynton, 7 Mass. 483; Musson *v.* Lake, 4 How. 262; Bank of Vergennes *v.* Cameron, 7 Barb. 143.

[7] See Hinsdale *v.* Miles, 5 Conn. 331.

[8] Gilbert *v.* Dennis, 3 Met. 495.

[9] Russell *v.* Langstaffe, Doug 514; *Ex parte* Johnston, 3 Dea. & Ch. 433; Bowes *v.* Howe, 5 Taunt. 30; Gower *v.* Moore, 25 Maine, 16; Ireland *v.* Kip, Anthon, 142; Shaw *v.* Reed, 12 Pick. 132; Groton *v.* Dallheim, 6 Greenl. 476; Holland *v.* Turner, 10 Conn. 308.

[10] See Byles on Bills, 158. But see Howe *v.* Bowes, 16 East, 112, 5 Taunt. 30.

[11] See *ante*, p. 105, n. 3.

shut up his house, the holder must nevertheless inquire after him, and find him, if he can by proper efforts.[1] If the payer be dead, demand should be made at his house, unless he have personal representatives, and in that case, of them.[2] And if the holder die, presentment should be made by his personal representatives.[3] It is said that both the death and insolvency of the payer do not relieve the holder from the duty of demanding payment.[4] But it seems to be held in one case that, where the maker of a negotiable note was dead at the time the indorsement was made, the indorser was chargeable without demand on the maker.[5]

If the drawer has no effects in the hands of the drawee, and has made no arrangement equivalent to having effects there, non-presentation for payment is no defence as to him.[6]

Impossibility of presenting a bill for payment, without the fault of the holder, as the actual loss of a bill, or the like, will excuse some delay in making a demand for payment; but not more than the circumstances require.[7]

In this country, all negotiable paper payable at a time certain, is entitled to grace, which here means three days delay of payment, unless it be expressly stated and agreed that there shall be no grace; and a presentment for payment before the last day of grace, is premature, the note not being due until then.[8] If the

[1] Ellis *v.* Commercial Bank of Natchez, 7 How. (Miss.) 294.

[2] See *ante*, p. 105, n. 1; Chitty on Bills, 357.

[3] Chitty on Bills, 357.

[4] Johnson *v.* Harth, 1 Bailey, 482.

[5] Davis *v.* Francisco, 11 Missouri, 572.

[6] Thus, in Terry *v.* Parker, 6 Ad. & El. 502, it was held that, if the drawee of a bill of exchange has no effects in the hands of the drawee at the time of drawing the bill, and of its maturity, and has no ground to expect that it will be paid, it is not necessary to present the bill at maturity; and if it be presented two days after, and payment be refused, the drawer is liable. And Lord *Denman* said: "Many cases establish that notice of dishonor need not be given to the drawer in such a case; and the reason assigned is, because he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since, if the bill were presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment and payment." And see Commercial Bank of Albany *v.* Hughes, 17 Wend. 94; Dickins *v.* Beal, 10 Pet. 572; Foard *v.* Womack, 2 Ala. 368.

[7] Aborn *v.* Bosworth, 1 R. I. 401; Patience *v.* Townley, 2 Smith, 223. But where a bill payable in London, was by mistake sent from Birmingham, where the holder resided, to Liverpool, to be presented for payment, and the mistake was discovered and attempted to be cured by sending the bill to London, where it did not arrive until two days after its maturity, but would have arrived in season but for the oversight or negligence of the clerks of the post-office in Liverpool, it was held that such mistake or negligence was not a sufficient excuse for not presenting the bill on the day it fell due.

[8] Wiffen *v.* Roberts, 1 Esp. 261; Mitchell *v.* Degrand, 1 Mason, 176.

last day of grace falls on a Sunday, or on a legal holiday, the note is due on the Saturday, or other day before the holiday.[1] But if there be no grace, and the note falls due on a Sunday, or other holiday, it is not payable until the next day.[2]

Generally, if a bill or note be payable in or after a certain number of days, from date, sight, or demand, in counting these days, the day of date, sight, or demand is excluded, and the day on which it falls due included.[3]

Although payment must be demanded promptly, it need not be done instantly; a holder has all the business part of the day in which the bill falls due to make his demand in.[4]

Bills and notes payable on demand, should be presented for payment within a reasonable time. If said to be "on interest," this strengthens the indication that they were intended to remain for a time unpaid and undemanded. But to hold indorsers, they should still be presented within whatever the circumstances may make a reasonable time; and this is such a time as the interests and safety of all concerned may require.[5] A bill or note in which no time of payment is expressed, is held to be payable on demand.[6] And evidence to prove it otherwise is inadmissible.[7]

[1] Ransom *v.* Mack, 2 Hill, 587; Cuyler *v.* Stevens, 4 Wend. 566; Sheldon *v.* Benham, 4 Hill, 129; Homes *v.* Smith, 20 Maine, 264; Tassell *v.* Lewis, 1 Ld. Raym. 743; Haynes *v.* Birks, 3 B. & P. 599; Bussard *v.* Levering, 6 Wheat. 102.

[2] Salter *v.* Burt, 20 Wend. 205; Avery *v.* Stewart, 2 Conn. 69; Delamater *v.* Miller, 1 Cow. 75; Barrett *v.* Allen, 10 Ohio, 426. And if the nominal day of payment, in an instrument which is entitled to grace, happens to fall on a Sunday or a holiday, the days of grace are the same as in other cases, and payment is not due until the third day after. Wooley *v.* Clements, 11 Ala. 220.

[3] Chitty on Bills, 370.

[4] Wilkins *v.* Jadis, 2 B. & Ad. 188; Barclay *v.* Bailey, 2 Campb. 527; Morgan *v.* Davison, 1 Starkie, 114; Cayuga County Bank *v.* Hunt, 2 Hill, 635.

[5] Furman *v.* Haskin, 2 Caines, 369; Sice *v.* Cunningham, 1 Cow. 408; Mohawk Bank *v.* Broderick, 10 Wend. 304; Bank of Utica *v.* Smedes, 3 Cow. 662. And what is a reasonable time in such case is a question of law. See cases *supra*. In Seaver *v.* Lincoln, 21 Pick. 267, it was held that a demand on the maker of a note payable on demand, made on the seventh day from the date, was made within a reasonable time to charge the indorser. And *Shaw*, C. J., said: "One of the most difficult questions presented for the decision of a court of law, is, what shall be deemed a reasonable time, within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another. In the present case, however, the court have no hesitation in stating it as their opinion, that a demand within seven days of the date of the note was within a reasonable time to charge the indorser." In Vreeland *v.* Hyde, 2 Hall, 429, it was held that the rule requiring promissory notes, payable on demand, to be presented within a "reasonable time," was applicable chiefly to those which are made for commercial purposes.

[6] Whittock *v.* Underwood, 2 B. & Cr. 157.

[7] Warren *v.* Wheeler, 8 Met. 97; Atwood *v.* Cobb, 16 Pick. 227; Ryan *v.* Hall, 13 Met. 520; Thomson *v.* Ketchum, 8 Johns. 189.

The holder of a check should present it at once; for the drawer has a right to expect that he will; it should, therefore, be presented, or forwarded for presentment, in the course of the day following that in which it was received, or, upon failure of the bank, the holder will lose the remedy he would otherwise have had against the person from whom he receives it.[1] If the drawer of the check had no funds, he is liable always.[2]

Every demand or payment should be made at the proper place, which is either the place of residence or of business, and within the proper hours of business.[3] If made at a bank after hours of business, if the officers are there, and refuse payment for want of funds, the demand is sufficient.[4]

A note payable at a particular place, should be demanded at that place; and a bill drawn payable at a particular place, should be demanded there, in order to charge antecedent parties;[5] but

[1] Rickford *v.* Ridge, 2 Campb. 539; Boddington *v.* Schlencher, 4 B. & Ad. 752; Moule *v.* Brown, 4 Bing. N. C. 266.

[2] Hoyt *v.* Seeley, 18 Conn. 353.

[3] If the bill or note be payable at a bank, it must be presented strictly within the usual banking hours. Parker *v.* Gordon, 7 East, 385; Elford *v.* Teed, 1 M. & Selw. 28. But if it be not payable at a bank, it may be presented at any time of the day when the payer may reasonably be expected to be found at his place of residence or business, though it be six, seven, or eight o'clock in the evening. Thus, in Barclay *v.* Bailey, 2 Campb. 527, it was held that the presentment of a bill of exchange for payment at the house of a merchant residing in London, at 8 o'clock in the evening of the day it became due, was sufficient to charge the drawer. And Lord *Ellenborough* said: "A common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the presentment had been during the hours of rest, it would have been altogether unavailing; but eight in the evening cannot be considered an unreasonable hour for demanding payment at the house of a private merchant who has accepted a bill." So, in Wilkins *v.* Jadis, 2 B. & Ad. 188, it was held that a presentment of a bill of exchange for payment at a house in London, where it was made payable, at eight o'clock in the evening of the day it became due, was sufficient to charge the drawer, although at that hour the house was shut up, and no person was there to pay the bill. And Lord *Tenterden* said: "As to bankers, it is established, with reference to a well-known rule of trade, that a presentment out of the hours of business is not sufficient; but in other cases the rule of law is, that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable; but I cannot say that a presentment between seven and eight in the evening is not a presentment at a reasonable time." And see Morgan *v.* Davison, 1 Stark. 114. See also *ante*, p. 104, n. 3.

[4] Thus, in Garnett *v.* Woodcock, 6 M. & S. 44, 1 Stark. 475, it was held that a presentment of a bill of exchange at the banking-house where payable, after banking hours, is sufficient if a person be stationed at the banking-house and return for answer that there are no orders. And the court said: "Here, though the presentment was out of banking hours, there was a person stationed for the purpose of returning an answer, and an answer was returned, the same as would have been if the presentment had been within the hours of business. The answer was not that the party came too late, but that there were no orders; the object of the presentment was, therefore, completed, after which it cannot be open to either party to aver that it was out of time." And see Henry *v.* Lee, 2 Chitty, 124; Commercial and Railroad Bank *v.* Hamer, 7 How. (Miss.) 448; Cohea *v.* Hunt, 2 Sm. & Marsh. 227; Flint *v.* Rogers, 15 Maine, 67.

[5] United States Bank *v.* Smith, 11 Wheat. 171; Watkins *v.* Crouch, 5 Leigh, 522.

an action may be maintained against the maker or acceptor without such demand.[1] He, however, may discharge himself of damages and costs by showing that he was ready at that place with funds.[2] If a bill drawn payable generally, be accepted payable at a particular place, we think the holder may and should so far regard this as non-acceptance that he should protest and give notice.[3] But if this limited acceptance is assented to and received, it must be complied with by the holder, and the bill must be presented for payment at that place, or the antecedent parties are discharged.[4]

If payable at a banker's, or the house or counting-room of any person, and such banker or person becomes the owner at maturity, this is demand enough; and if there are no funds deposited with him for the payment, this is refusal enough.[5] If any house

[1] United States Bank *v.* Smith, 11 Wheat. 171; Wolcott *v.* Van Santvoord, 17 Johns. 248; Caldwell *v.* Cassidy, 8 Cow. 271; Haxtun *v.* Bishop, 3 Wend. 13; Wallace *v.* McConnell, 13 Pet. 136; Watkins *v.* Crouch, 5 Leigh, 522; Green *v.* Goings, 7 Barb. 652; Carley *v.* Vance, 17 Mass. 389; Payson *v.* Whitcomb, 15 Pick. 212; Bacon *v.* Dyer, 3 Fairf. 19.

[2] See cases cited in preceding note.

[3] Thus, in Gammon *v.* Schmoll, 5 Taunt. 344, it was held that if a person to whom a bill is directed generally, accepts it payable at a particular place, the holder need not receive such qualified acceptance, but may resort to the drawer as for non-acceptance. And see Boehm *v.* Garcias, 1 Campb. 425, n.; Parker *v.* Gordon, 7 East, 385; per *Bayley*, J., in Sebag *v.* Abitbol, 4 M. & S. 466.

[4] See cases *supra*.

[5] Saunderson *v.* Judge, 2 H. Bl. 509. In this case, A made a promissory note payable to B or order, with a memorandum upon it that it would be paid at the house of C, who was A's banker; in the course of business, the note was indorsed to C. In an action by C against the indorser, it was held not necessary to prove an actual demand on A. And per *Curiam:* "As they at whose house the note was to be paid, were themselves the holders of it, it was a sufficient demand for them to turn to their books, and see the maker's account with them, and a sufficient refusal, to find that he had no effects in their hands." The same question was presented in United States Bank *v.* Smith, 11 Wheat. 171. And *Thompson*, J., delivering the opinion of the court, said: "If the bank where the note is made payable is the holder, and the maker neglects to appear there when the note falls due, a formal demand is impracticable by the default of the maker. All that can in fitness be done, or ought to be required, is, that the books of the bank should be examined, to ascertain whether the maker had any funds in their hands; and if not, there was a default, which gave to the holder a right to look to the indorser for payment. And even this examination of the books was not required in the cases cited from the Massachusetts Reports. The maker was deemed in default by not appearing at the bank to take up his note when it fell due. We should incline, however, to think that the books of the bank ought to be examined, to ascertain whether the maker had any balance standing to his credit; for, if he had, the bank would have a right to apply it to the payment of the note; and no default would be incurred by the maker, which would give a right of action against the indorser." And see Bailey *v.* Porter, 14 M. & W. 44; Berkshire Bank *v.* Jones, 6 Mass. 524; Woodbridge *v.* Brigham, 12 id. 403.

be designated, a presentment to any person there,[1] or at the door if the house be shut up, is enough.[2]

If this direction be not in the body of the note, but added at the close or elsewhere as a memorandum, it is not part of the contract, and should not be attended to.[3]

If the payer has changed his residence, he should be sought for with due diligence; but if he has absconded, this is an entire excuse for non-demand.[4]

Where a bill or note is not presented for payment, or not presented at the time or to the person, or in the place or in the way required by law, all parties but the acceptor or maker are discharged.

5. *Of protest and notice.* — If a bill be not accepted when properly presented for that purpose, or if a bill or note, when properly presented for payment, be not paid, the holder has a further duty to perform to all who are responsible for payment. But this duty differs somewhat in the case of a bill and a note. In case of non-payment of a *foreign* bill, there should be a regular protest by a public notary;[5] but this, although frequently practised, is not necessary in the case of an inland bill or a promissory note.[6] But notice of non-payment should be given to all antecedent parties, equally, and in the same way, in the case of a bill and of a note.

The demand and protest must be made according to the laws of the place where the bill is payable.[7] It should be made by a

[1] Buxton *v.* Jones, 1 M. & Gr. 83. In this case a bill of exchange was presented for payment at the door of the house where the drawee was described as living, to a lodger who was coming from the passage of the house into the street. The drawee had removed to another residence, known to the occupier of the house, but not to the lodger; and it was not shown that he had left funds for payment. *Held*, that the presentment was sufficient.

[2] Hine *v.* Allely, 4 B. & Ad. 624.

[3] "In point of practice," said Lord *Tenterden*, in Williams *v.* Waring, 10 B. & Cr. 2, "the distinction between mentioning a particular place for payment of a note, in the body and in the margin of the instrument, has been frequently acted on. In the latter case it has been treated as a memorandum only, and not as a part of the contract; and I do not see any sufficient reason for departing from that course."

[4] See *ante*, p. 104, n. 8, and p. 105, n. 3.

[5] Gale *v.* Walsh, 5 T. R. 239; Rogers *v.* Stephens, 2 T. R. 713; Orr *v.* Maginnis, 7 East, 359; Bryden *v.* Taylor, 2 H. & Johns. 396; Townsley *v.* Sumrall, 2 Pet. 170.

[6] Young *v.* Bryan, 6 Wheat. 146; Burke *v.* McKay, 2 How. 66; Bonar *v.* Mitchell, 5 Exch. 415; Bay *v.* Church, 15 Conn. 15.

[7] Ellis *v.* Commercial Bank, 7 How. (Miss.) 294; Carter *v.* Union Bank, 7 Humph. 548. And see *ante*, p. 106, n. 2.

notary-public, who should present the bill himself;[1] but if there be no notary-public in that place or within reasonable reach, it may be made by any respectable inhabitant in the presence of witnesses.[2]

The protest should be noted on the day of demand and refusal; and may be filled up afterwards, even, perhaps, so late as at the trial.[3] English authorities say that there may be a protest for better security; but this practice is, we believe, unknown in this country, and nothing seems to be gained by it there, unless, as is said, there may then be a second acceptance for honor, which cannot otherwise be made.[4]

The loss of a bill is not a sufficient excuse for not protesting it.[5] But a subsequent promise to pay is held to imply protest and notice.[6]

The notarial seal is evidence of the dishonor of a foreign bill;[7] but not, it would seem, of an inland bill.[8] And no collateral statement in the certificate is evidence of the fact stated; thus, the statement by a notary that the drawee refused to accept or pay because he had no funds of the drawer, is no evidence of the absence of such funds.[9]

The general, or, indeed, universal duty of the holder of negotiable paper is, to give notice of any refusal to accept or pay to all antecedent parties. The reason of this is obvious. These previous parties have engaged that the party who should accept

[1] It cannot be done by an agent. Carmichael *v.* The Bank of Pennsylvania, 4 How. (Miss.) 567; Sacrider *v.* Brown, 3 McLean, 481; Chenowith *v.* Chamberlin, 6 B. Monr. 60; Bank of Kentucky *v.* Garey, id. 626; Carter *v.* Union Bank, 7 Humph. 548.

[2] Byles on Bills, 200.

[3] Goostrey *v.* Mead, Bull. N. P. 271; Chaters *v.* Bell, 4 Esp. 48; Orr *v.* Maginnis, 7 East, 359.

[4] See Byles on Bills, 202.

[5] Byles on Bills, 204.

[6] Thus, in Gibbon *v.* Coggon, 2 Campb. 188, in an action against the drawer of a foreign bill of exchange, it was held that a promise of payment by the defendant after the bill was due, was sufficient evidence of a protest for non-payment, and notice of the dishonor of the bill. And Lord *Ellenborough* said: "By the drawer's promise to pay, he admits his liability; he admits the existence of every thing which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected that there was no protest. Instead of that, he promises to pay it. I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary." And see Patterson *v.* Becher, 6 Moore, 319; Greenway *v.* Hindley, 4 Campb. 52; Campbell *v.* Webster, 2 C. B. 258.

[7] Anonymous, 12 Mod. 345; Bryden *v.* Taylor, 2 H. & Johns. 399; Nicholls *v.* Webb, 8 Wheat. 333; Townsley *v.* Sumrall, 2 Pet. 179; Bank of Kentucky *v.* Pursley, 3 Monr. 238; Chase *v.* Taylor, 4 H. & Johns. 54.

[8] See Chesmer *v.* Noyes, 4 Campb. 129. And see cases *supra*.

[9] Dumont *v.* Pope, 7 Blackf. 367.

or pay will do so; and they have further engaged that, if he refuses to do his duty, they will be liable in his stead to the persons injured by his refusal. They have a right to indemnity or compensation from the party for whom they are liable, and to such immediate notice of his failure as shall secure to them an immediate opportunity of procuring this indemnity or compensation if they can. Nor is the question what notice this should be, left to be judged of by the circumstances of each case; for the law-merchant has certain fixed rules applicable to all negotiable paper.

Notice must be given even to one who has knowledge.[1] No particular form is necessary; it may be in writing or oral;[2] all that is absolutely essential is, that it should designate the note or bill with sufficient distinctness, and state that it has been dishonored;[3] and also that the party notified is looked to for payment;[4] but it has been held that the notice to the party, when given by the immediate holder of the bill, sufficiently implies that he is looked to.[5] And notice of protest for non-payment is sufficient notice of demand and refusal.[6] How distinctly the note or bill should be described, cannot be precisely defined. It is enough if there be no such looseness, ambiguity, or misdescription as might mislead a man of ordinary intelligence; and if the intention was to describe the true note, and the party notified

[1] Caunt *v.* Thompson, 7 C. B. 400; Burgh *v.* Legge, 5 M. & W. 418.

[2] Phillips *v.* Gould, 8 C. & P. 355; Glasgow *v.* Pratte, 8 Missouri, 336; Cuyler *v.* Stevens, 4 Wend. 566.

[3] Hartley *v.* Case, 4 B. & Cr. 339. In this case, an indorsee sent a letter to the drawer, merely demanding payment; and it was held not sufficient. *Abbott*, C. J., said: "There is no precise form of words necessary to be used in giving notice of the dishonor of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here, the letter in question did not convey to the defendant any such notice; it does not even say that the bill was ever accepted." And see Solarte *v.* Palmer, 7 Bing. 530, 2 Cl. & Fin. 93; Everard *v.* Watson, 1 El. & Bl. 801; Caunt *v.* Thompson, 7 C. B. 400; Hedger *v.* Steavenson, 2 M. & W. 799; Lewis *v.* Gompertz, 6 id. 399; Grugeon *v.* Smith, 6 Ad. & El. 499; Boulton *v.* Welsh, 3 Bing. N. C. 688; Houlditch *v.* Cauty, 4 id. 411; Strange *v.* Price, 10 Ad. & El. 125; Messenger *v.* Southey, 1 M. & Gr. 76; Furze *v.* Sharwood, 2 Q. B. 388; Gilbert *v.* Dennis, 3 Met. 495; Pinkham *v.* Macy, 9 id. 174.

[4] Per *Ashhurst* and *Buller*, JJ., in Tindal *v.* Brown, 1 T. R. 167; East *v.* Smith, 4 Dowl. & L. 744.

[5] Furse *v.* Sharwood, 2 Q. B. 416. In this case, Lord *Denman* said: "Where notice has been given by another party than the holder, there may be good sense in requiring that it shall be accompanied by a direct demand of payment, or a statement that it will be required of the party addressed; but in no case has the absence of such information been held to vitiate a notice in other respects complete, and which has come directly from the holder." And see King *v.* Bickley, 2 Q. B. 419; Miers *v.* Brown, 11 M. & W. 372.

[6] Spies *v.* Newberry, 2 Doug. (Mich.) 425; Smith *v.* Little, 10 N. H. 526.

was not actually misled, perhaps this is always enough. The notice need not state for whom payment is demanded, nor where the note is lying;[1] and even a misstatement in this respect may not be material, if it do not actually mislead.[2]

No copy of the protest need be sent;[3] but information of the protest should be given.

If the letter be properly put into the post-office, any miscarriage of the mail does not affect the party giving notice.[4] The address should be sufficiently specific. Only the surname — as "Mr. A" — especially if sent to a large city, might not, in general, be enough.[5] The postmarks are strong evidence that the letter was mailed at the very time these marks indicate; but this evidence may be rebutted.[6] A notice not only may, but should be sent by the public post. It may, however, be sent by

[1] Woodthorpe *v.* Lawes, 2 M. & W. 109; Housego *v.* Cowne, id. 348; Harrison *v.* Ruscoe, 15 id. 231.

[2] Rowlands *v.* Springett, 14 M. & W. 7.

[3] See Blakely *v.* Grant, 6 Mass. 386; Lenox *v.* Leverett, 10 Mass. 1; Wallace *v.* Agry, 4 Mason, 336; Wells *v.* Whitehead, 15 Wend. 527.

[4] Woodcock *v.* Houldsworth, 16 M. & W. 124. In this case, *Pollock*, C. B., before whom the cause was tried, directed the jury to inquire when the notice was received by the party to whom it was sent. And this was held incorrect. *Parke*, B., said: "The jury should have been asked to say on what day the letter was posted, not on what day it was received. Notices of dishonor are generally put into the post; when that is done, although, by some mistake or delay at the post-office, the letter fails to reach its destination in proper time, the party who posted it ought not to be prejudiced; he has done all that was usual and necessary, and he does not guarantee the certainty or correctness of the post-office delivery." And see, to the same effect, Dobree *v.* Eastwood, 3 C. & P. 250; Stocken *v.* Collin, 7 M. & W. 515.

[5] Thus, in Walter *v.* Haynes, Ry. & M. 149, where a letter, directed "Mr. Haynes, Bristol," containing notice of the dishonor of a bill, was proved to have been put into the post-office, it was held that this was not sufficient proof of notice; the direction being too general to raise a presumption that the letter reached the particular individual intended. And *Abbott*, C. J., said: "Where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of a delivery into the hands of that person, because it is a safe and reasonable presumption that it reaches its destination; but where a letter is addressed generally to A B, at a large town, as in the present case, it is not to be absolutely presumed from the fact of its having been put into the post-office, that it was ever received by the party for whom it was intended. The name may be unknown at the post-office, or if the name be known, there may be several persons to whom so general an address would apply. It is, therefore, always necessary, in the latter case, to give some further evidence to show that the letter did in fact come to the hands of the person for whom it was intended." But where a party drew a bill, dating it generally "London," it was held that proof that a letter containing notice of the dishonor of the bill, was put into the post-office, addressed to the drawer at "London," was evidence to go to the jury that he had due notice of dishonor. And Lord *Abinger* said: "I have known such evidence admitted a hundred times. If the party chooses to draw a bill, and date it so generally, it implies that a letter sent to the post-office, and so directed, will find him." And see, to the same effect, Mann *v.* Moors, Ry. & M. 249; Burmester *v.* Barron, 17 Q. B. 828.

[6] Stocken *v.* Collin, 7 M. & W. 515; Woodcock *v.* Houldsworth, 16 id. 124; Crawford *v.* The Branch Bank at Mobile, 7 Ala. 205.

a private messenger; but is not sufficient if it do not arrive until after the time at which it would have arrived by mail.[1] It may be sent to the town where the party resides, or to another town, or a more distant post-office, if it is clear that he may thereby receive the notice earlier.[2] And if the notice is sent to what the sender deems, after due diligence, the nearest post-office, this is enough.[3] If the parties live in the same town, notice should not be sent by mail.[4]

The notice should be sent either to the place of business, or to the residence of the party notified.[5] But if one directs a notice to be sent to him elsewhere than at home, it seems that it may be so sent, and bind not only him but prior parties, although time is lost by so sending it.[6]

The notice should be sent within reasonable time; and in respect to negotiable paper, the law-merchant defines this within very narrow limits. If the parties live in the same town, notice must be given so that the party to whom it is sent may receive the notice in the course of the day next after that in which the party sending has knowledge of the fact.[7] If the parties live in

[1] Darbishire *v.* Parker, 6 East, 3. If, however, it arrive on the same day and within business hours, it will be sufficient. Bancroft *v.* Hall, Holt, N. P. 476.

[2] United States Bank *v.* Lane, 3 Hawks, 453; Farmers' and Merchants' Bank *v.* Battle, 4 Humph. 86; Sherman *v.* Clark, 3 McLean. 91; Mercer *v.* Lancaster, 5 Penn. St. 160; Walker *v.* Bank of Augusta, 3 Geo. 486; Hunt *v.* Fish, 4 Barb. 324.

[3] Marsh *v.* Barr, Meigs, 68.

[4] Ireland *v.* Kip, 10 Johns. 490, 11 id. 231; Ransom *v.* Mack, 2 Hill, 587; Kramer *v.* M'Dowell, 8 W. & S. 138; Peirce *v.* Pendar, 5 Met. 352. In this last case, *Shaw*, C. J., said: "The general rule certainly is, that when the indorser resides in the same place with the party who is to give the notice, the notice must be given to the party personally, or at his domicile or place of business. Perhaps a different rule may prevail in London, where a penny post is established and regulated by law, by whom letters are to be delivered to the party addressed, or at his place of domicile or business, on the same day they are deposited. And, perhaps, the same rule might not apply where the party to whom notice is to be given, lives in the same town, if it be at a distant village or settlement where a town is large, and there are several post-offices in different parts of it. But of this we give no opinion. In the present case, the defendant had his residence and place of business in the city of Bangor, and the only notice given him was by a letter, addressed to him at Bangor, and deposited in the post-office at that place. And we are of opinion that this was insufficient to charge him as indorser."

[5] Bank of Columbia *v.* Lawrence, 1 Pet. 578. And see cases cited in preceding note.

[6] Shelton *v.* Braithwaite, 8 M. & W. 252.

[7] Smith *v.* Mullett, 2 Campb. 208. In this case, Lord *Ellenborough* said: "Where the parties reside in London, each party should have a day to give notice. The holder of a bill is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonor. If you limit a man to a fractional part of a day, it will come to a question how swiftly the notice can be conveyed,—a man and horse must be employed, and you will have a race against time." And see Scott *v.* Lifford, 9 East, 347; Hilton *v.* Fairclough, 2 Campb. 633; Haynes *v.* Birks, 3 B. & P. 599; Fowler *v.* Hendon, 4 Tyr. 1002; Grand Bank *v.* Blanchard, 23 Pick. 305.

different places, the notice must be sent as soon as by the first practicable mail of the next day.[1] Each party receiving notice has a day, or until the next post after the day in which he receives it, before he is obliged to send the notice forward. Thus, a banker with whom the paper is deposited for collection, is considered a holder, and entitled to a day to give notice to the depositor, who then has a day for his notice to antecedent parties.[2] The different branches of one establishment have been held distinct holders for this purpose.[3]

If notice be sent by ship, it is said that it may be delayed until the next regular ship;[4] but this is not quite certain; or, rather, the rule can hardly as yet be considered fixed and definite. It should be sent by the first proper opportunity.

Neither Sunday nor any legal holiday is to be computed in reckoning the time within which notice must be given.[5]

There is no presumption of notice; and the plaintiff must prove that it was given and was sufficient. Thus, proving that it was given in "two or three days," is insufficient, if *two* would have been right, but *three* not.[6]

[1] Williams *v.* Smith, 2 B. & Ald. 496. In this case, *Abbott,* C. J., said: "It is of the greatest importance to commerce that some plain and precise rule should be laid down to guide persons in all cases as to the time within which notices of the dishonor of bills must be given. That time I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonor. If, instead of that rule, we were to say that the party must give notice by the next practicable post, we should raise in many cases difficult questions of fact, and should, according to the peculiar local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated." And see Wright *v.* Shawcross, 2 B. & Ald. 501, n. (a). And if no post goes out the next day, the party may wait until the next post day. Geill *v.* Jeremy, M. & Malk. 61. And if the first post of the next day goes out at an early hour in the morning, the party may wait until the next post. Thus, where a bill was dishonored on Saturday in a place where the post went out at half after nine in the morning, it was held that it was sufficient notice of dishonor to send a letter by the following Tuesday morning's post. Hawkes *v.* Salter, 4 Bing. 715. And see Howard *v.* Ives, 1 Hill, 263. In this case, *Cowen,* J., makes a question, whether, if there are several mails leaving on the same day, at different hours, the party may in all cases elect by which he will send. See Whitwell *v.* Johnson, 17 Mass. 449, 454.

[2] Bray *v.* Hadwen, 5 M. & S. 68; Firth *v.* Thrush, 8 B. & Cr. 387; Howard *v.* Ives, 1 Hill, 263.

[3] Thus, in Clode *v.* Bayley, 12 M. & W. 51, where a bill of exchange was indorsed to a branch of the National Provincial Bank of England, at Postmadoc, who sent it to the Pwylheli branch of the same bank, who indorsed it to the head establishment in London; it was *held* that each of the branch banks were to be considered as independent indorsers, and each entitled to the usual notice of dishonor.

[4] Muilman *v.* D'Eguino, 2 H. Bl. 565. And see Fleming *v.* M'Clure, 1 Brev. 428.

[5] Eagle Bank *v.* Chapin, 3 Pick. 180; Agnew *v.* Bank of Gettysburg, 2 H. & Gill, 478; Hawkes *v.* Salter, 4 Bing. 715; Wright *v.* Shawcross, 2 B. & Ald. 501, n. (a); Bray *v.* Hadwen, 5 M. & S. 68; Cuyler *v.* Stevens, 4 Wend. 566; Lindo *v.* Unsworth, 2 Campb. 602.

[6] Lawson *v.* Sherwood, 1 Stark. 314.

Notice should be given only by a party to the instrument, who is liable upon it, and not by a stranger;[1] and it has been held that notice could not be given by a first indorser who, not having been notified, was not himself liable.[2] A notice by any party liable, will enure to the benefit of all antecedent or subsequent parties. The notice may be given by any authorized agent of a party who could himself give notice.[3]

Notice must be given to every antecedent party who is to be held. And we have seen that this may be given by a holder to the first party liable, and by him to the next, &c. But the holder may always give notice to all antecedent parties; and it is always prudent, and in this country, we believe, quite usual, to do so.[4]

Notice may be given personally to a party, or to his agent authorized to receive notice, or left in writing at his home or place of business.[5] If the party to be notified is dead, notice should be given to his personal representatives.[6] A notice addressed to "the legal representative," and sent to the town in which the deceased party resided at his death, has been held sufficient.[7] But a notice addressed to the party himself, when known to be dead, or to "the estate of, &c.," would not be sufficient, but might become so with evidence that the administrator or executor actually received the notice.[8]

[1] It was formerly held that the notice must be given by the actual holder of the bill. See Tindal *v.* Brown, 1 T. R. 167, 2 id. 186; *Ex parte* Barclay, 7 Ves. 597. But it was decided in Chapman *v.* Keane, 3 Ad. & El. 193, that a notice given by any party to the bill was sufficient; and, therefore, that an indorsee, who has indorsed over, and is not the holder at the time of the maturity and dishonor, may give notice at such time to an earlier party, and, upon afterwards taking up the bill and suing such party, may avail himself of such notice. And see Harrison *v.* Ruscoe, 15 M. & W. 231; Stewart *v.* Kennett, 2 Campb. 177; Lysaght *v.* Bryant, 19 L. J., C. P., 160; Chanoine *v.* Fowler, 3 Wend. 173.

[2] See cases in preceding note.

[3] Woodthorpe *v.* Lawes, 2 M. & W. 109.

[4] In such case the notice must be given to all the parties the day after the dishonor. Thus, if there be a drawer, acceptor, payee, and first indorsee of a bill of exchange, all residing in the same place, and the bill be dishonored on Monday, and the indorsee notify the payee on Tuesday, and the payee notify the drawer on Wednesday, this will be good. But if the indorsee wish to notify both the payee and the drawer, he must notify them both on Tuesday. See Rowe *v.* Tipper, 13 C. B. 249; Dobree *v.* Eastwood, 3 C. & P. 250; Chapcott *v.* Curlewis, 2 M. & Rob. 284; Smith *v.* Mullett, 2 Campb. 208; Marsh *v.* Maxwell, 2 Campb. 210, n.

[5] Crosse *v.* Smith, 1 M. & S. 545; Housego *v.* Cowne, 2 M. & W. 348.

[6] Merchants' Bank *v.* Birch, 17 Johns. 25; Oriental Bank *v.* Blake, 22 Pick. 206; Planters' Bank *v.* White, 2 Humph. 112; Cayuga Bank *v.* Bennett, 5 Hill, 236; Barns *v.* Reynolds, 4 How. (Miss.) 114.

[7] Pillow *v.* Hardeman, 3 Humph. 538.

[8] Cayuga Bank *v.* Bennett, 5 Hill, 236.

If two or more parties are jointly liable on a bill as partners, notice to one is enough.[1]

One transferring by delivery a note or bill payable to bearer is not entitled to notice of non-payment, unless the circumstances of the case are such as to make him liable; and then he is entitled to such reasonable notice only as is due to a guarantor.[2] As if, for instance, the paper was transferred as security, or even in payment of a preëxisting debt. For this revives if the bill or note be dishonored, and there must be notice given of the dishonor. In general, a guarantor of a bill or note, or debt, is entitled only to such notice as shall save him from actual injury; and cannot interpose the want of notice as a defence, unless he can show that the notice was unreasonably withheld or delayed, and that he has actually sustained injury from such delay or want of notice.[3] And if an indorser give also a bond to pay the debt, he is not discharged from his bond by want of notice.[4]

In general, all parties to negotiable papers, who are entitled to notice, are discharged by want of notice. The law presumes them to be injured, and does not put them to proof.[5] It has been held, however, that the drawer of a check not notified of non-payment, is thereby discharged only to the extent of the loss which he actually sustains.[6]

[1] Porthouse *v.* Parker, 1 Campb. 83; Sayre *v.* Frick, 7 W. & S. 383; Willis *v.* Green, 5 Hill, 232; Dabney *v.* Stidger, 4 Sm. & Marsh. 749; Cocke *v.* Bank of Tennessee, 6 Humph. 51.

[2] "If a person deliver a bill to another without indorsing his own name upon it, he does not subject himself to the obligations of the law-merchant; he cannot be sued on the bill either by the person to whom he delivers it, or by any other. And, as he does not subject himself to the obligations, we think he is not entitled to the advantages. If the holder of a bill sell it without his own indorsement, he is, generally speaking, liable to no action in respect of the bill. If he deliver it without his indorsement upon any other consideration, antecedent or concomitant, the nature of the transaction, and all circumstances regarding the bill, must be inquired into, in order to ascertain whether he is subject to any responsibility. If the bill be delivered and received as an absolute discharge, he will not be liable; if otherwise, he may be." Per Lord *Tenterden*, in Van Wart *v.* Woolley, 3 B. & Cr. 439. And see Van Wart *v.* Smith, 1 Wend. 219; Swinyard *v.* Bowes, 5 M. & S. 62.

[3] See Warrington *v.* Furbor, 8 East, 242; Philips *v.* Astling, 2 Taunt. 206; Swinyard *v.* Bowes, 5 M. & S. 62; Holbrow *v.* Wilkins, 1 B. & Cr. 10; Van Wart *v.* Woolley, 3 B. & Cr. 439; Walton *v.* Mascall, 13 M. & W. 72; Hitchcock *v.* Humpfrey, 5 M. & Gr. 559. And *ante*, p. 70, n. 1.

[4] Murray *v.* King, 5 B. & Ald. 165.

[5] Bridges *v.* Berry, 3 Taunt. 130. In this case the defendant being unable to pay a bill when due, which he had accepted, obtained time, and indorsed to the plaintiff, as a security, a bill drawn by himself to his own order, which, when due, was dishonored by the drawee, but the holder omitted to give the defendant notice: *Held*, that by this laches the defendant was not only discharged as indorser of the one bill, but also as acceptor of the other.

[6] Pack *v.* Thomas, 13 Sm. & M. 11. And see *ante*, p. 109, n 1.

If one who is discharged by want of notice, nevertheless pays the bill or note, he may call upon the antecedent parties, if due notice has been given to them, and if, by taking up the paper, he acquires the rights of the holder; or if he, having been indorsee, indorsed the paper over; for he is then remitted to his rights and position as indorsee.

The right to notice may be waived by any agreement to that effect prior to the maturity of the paper.[1] It is quite common for an indorser to write, "I waive notice," or, "I waive demand," or some words to this effect. It should, however, be remembered that these rights are independent. A waiver of demand may imply a waiver of notice of non-payment; but a waiver of notice of non-payment certainly does not imply a waiver of demand.[2] So, if a drawer countermands his order, the bill should still be presented, but notice of dishonor need not be given to the drawer.[3] Or, if a drawer has no funds, and nothing equivalent to funds, in the drawee's hands, and would have no remedy against him or any one else, as he cannot be prejudiced by want of notice, it is not necessary to give him notice.[4] But the indorser must still be notified;[5] and a drawer for the accommodation of the acceptor, is entitled to notice, because he might have a claim upon the acceptor.[6]

If a drawer make a bill payable at his own house, or counting-room, this has been said to be evidence to a jury that the bill was

[1] Thus, in Phipson *v.* Kneller, 4 Campb. 285, the drawer of a bill of exchange, a few days before it became due, stated to the holder that he had no regular residence, and that he would call and see if the bill was paid by the acceptor. *Held*, that under these circumstances he was not entitled to notice of its dishonor. And see Burgh *v.* Legge, 5 M. & W. 418.

[2] Drinkwater *v.* Tebbetts, 17 Maine, 16; Lane *v.* Steward, 20 Maine, 98; Berkshire Bank *v.* Jones, 6 Mass. 524; Backus *v.* Shipherd, 11 Wend. 629; Buchanan *v.* Marshall, 22 Vt. 561.

[3] Hill *v.* Heap, D. & R. N. P. 57; Prideaux *v.* Collier, 2 Stark. 57.

[4] Bickerdike *v.* Bollman, 1 T. R. 405; Cory *v.* Scott, 3 B. & Ald. 619; Carter *v.* Flower, 16 M. & W. 743.

[5] Wilkes *v.* Jacks, Peake, 202. This was an action against the indorser of a bill of exchange. It appeared that notice had not been given to the defendant, whereupon the plaintiff offered to show that the drawer had no effects in the hands of the drawee. But Lord *Kenyon* said: "That circumstance will not avail the plaintiff; the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee."

[6] *Ex parte* Heath, 2 Ves. & Beam. 240; Sleigh *v.* Sleigh, 5 Exch. 514. And where a bill was drawn for the accommodation of an indorsee, and neither such indorsee nor the drawer had any effects in the hands of the acceptor, it was held that a subsequent indorsee, in order to recover against the drawer, was bound to give him notice, for the drawer had a remedy over against his immediate indorsee. Norton *v.* Pickering, 8 B. & Cr. 610; Cory *v.* Scott, 3 B. & Ald. 619.

drawn for his accommodation, and that he expects to provide for the payment, and is not entitled to notice of dishonor.[1]

Actual ignorance of a party's residence justifies the delay necessary to find it out, and no more;[2] and after it is discovered, the notifier has the usual time.[3]

Death, or severe illness of the notifier or his agent, is an excuse for delay; but the death, bankruptcy, or insolvency of the drawee is no excuse.[4]

As the right to notice may be waived before maturity, so the want of notice may be cured afterwards by an express promise to pay; and an acknowledgment of liability, or a payment in part, is evidence, but not conclusive evidence, of notice;[5] nor are the jury *bound* to draw this conclusion, even if the evidence be not rebutted.[6] If the promise be conditional, and the condition be not complied with, the promise has been held to be still evidence.[7] Nor is it sufficient to avoid such promise, that it was made in ignorance of the law; it must be made, however, with a full knowledge of the facts. The following distinction seems to be drawn; if the fact of neglect to notice appears, the party entitled to notice is not bound by his subsequent promise, unless it was made with a knowledge of the neglect; but if the fact of

[1] Sharp *v.* Bailey, 9 B. & Cr. 44.

[2] Bateman *v.* Joseph, 2 Campb. 461, 12 East, 433. In this case, Lord *Ellenborough* said: "When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonor of the bill, within the usage and custom of merchants." But, in Beveridge *v.* Burgis, 3 Campb. 262, where the holder, being ignorant of the indorser's residence, made inquiries at a certain house where the bill was made payable, Lord *Ellenborough* said: "Ignorance of the indorser's residence may excuse the want of due notice; but the party must show that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should be obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared upon the bill, and application might have been made to persons of the same name with the defendant, whose addresses are set down in the directory." And see Porter *v.* Judson, 1 Gray, 175.

[3] Firth *v.* Thrush, 8 B. & Cr. 387.

[4] Lawrence *v.* Langley, 14 N. H. 70; Esdaile *v.* Sowerby, 11 East, 114; Boultbee *v.* Stubbs, 18 Ves. 20; Barton *v.* Baker, 1 Serg. & R. 334; Gibbs *v.* Cannon, 9 Serg. & R. 198.

[5] Vaughan *v.* Fuller, 2 Strange, 1246; Horford *v.* Wilson, 1 Taunt. 12; Lundie *v.* Robertson, 7 East, 231; Brett *v.* Levett, 13 East, 213; Wood *v.* Brown, 1 Stark. 217; Rogers *v.* Stephens, 2 T. R. 713; Hicks *v.* The Duke of Beaufort, 4 Bing. N. C. 229; Booth *v.* Jacobs, 3 Nev. & M. 351; Brownell *v.* Bonney, 1 Q. B. 39.

[6] See Byles on Bills, 238; Bell *v.* Frankis, 4 M. & Gr. 446.

[7] Campbell *v.* Webster, 2 C. B. 258.

neglect does not appear, the subsequent promise will be taken as evidence that there was no neglect, but sufficient notice.[1] And a promise to pay, made in expectation of the dishonor of a bill or note, will be construed as a promise on condition of usual demand and notice, and, of course, does not waive them.[2] And, as we have remarked, no waiver of laches can affect any party but him who makes the waiver.

SECTION VI.

OF THE RIGHTS AND DUTIES OF AN INDORSER.

Only a note or bill payable to a payee or order is, strictly speaking, subject to indorsement. Those who write their names on the back of any note or bill, are indorsers in one sense, and are sometimes called so.

The payee of a negotiable bill or note — whether he be also maker or not — may indorse it, and afterwards any person, or any number of persons, may indorse it. The maker promises to pay to the payee or his order; and the indorsement is an order to pay the indorsee, and the maker's promise is then to him. But if the original promise was to the payee or order, this "or order," which is the negotiable element, passes over to the indorsee, and he may indorse, and so may his indorsee, indefinitely.[3]

Each indorser, by his indorsement, does two things; first, he orders the antecedent parties to pay to his indorsee; and next, he engages with his indorsee that if they do not pay, he will.

What effect an indorsement of a negotiable note or bill by one not payee, *before* the indorsement by payee, should have, is not quite certain. Upon the whole, however, we should hold, with some reason and authority, that, where such a name appears, as it may be made to have the place of a second indorser whenever the payee chooses to write his name over it, it shall be held to be so intended, in the absence of evidence;[4] and then, of course,

[1] Tebbetts *v.* Dowd, 23 Wend. 379.
[2] Pickin *v.* Graham, 1 Cr. & M. 725.
[3] More *v.* Manning, 1 Com. 311; Acheson *v.* Fountain, 1 Strange, 557; Edie *v.* The East India Co. 2 Burr. 1216; Gay *v.* Lander, 6 C. B. 336.
[4] This is the well-settled law in New York. See Dean *v.* Hall, 17 Wend. 214; Seabury *v.* Hungerford, 2 Hill, 80; Hall *v.* Newcomb, 3 Hill, 233, 7 id. 416; Spies *v.*

it gives the payee no claim against such a party, because a first indorser can have none against a second, but the second may have a claim against the first. But evidence is receivable to prove that the party put his name on the note for the purpose of adding to its security by becoming responsible for it to the payee. And then, if he indorsed the note before it was received by the payee, the consideration of the note attaches to him, and he may be held either as surety for consideration, or as a maker.[1] If he wrote his name on the note after it was made, and, at the request of the payee or other holder, he is bound only as guarantor or surety, and the consideration of the note being exhausted, he is bound only by showing some new and independent consideration.[2] No one who thus indorses a note not negotiable, can be treated or considered precisely as a second indorser, whatever be the names on the paper before his own; but any indorser of such a note or bill may be held to be a new maker or drawer, or a guarantor or surety, as the circumstances of the case indicate or

Gilmore, 1 Barb. 158, 1 Comst. 321. But in Massachusetts, and some other States, such an indorser, in the absence of all evidence, is held as a co-maker. Union Bank *v.* Willis, 8 Met. 504; Martin *v.* Boyd, 11 N. H. 385; Flint *v.* Day, 9 Vt. 345; Nash *v.* Skinner, 12 id. 219. In Union Bank *v.* Willis, *supra*, A made a note payable to B or order; C put his name in blank on the back of the note, and B put his name in blank under C's name; A presented the note in this condition to the plaintiffs, who discounted it for him. On failure of A to pay the note, the plaintiffs gave notice to B and C of the non-payment, but did not present the note to C for payment. *Held*, in a suit by the plaintiffs against B, as indorser, that it was to be presumed that C put his name on the note at the time when A signed it; that he was, therefore, an original promisor; and that B was discharged by the omission of the plaintiffs to present the note to C for payment. *Hubbard*, J., in delivering the opinion of the court, said: "If the subject now brought before us were a new one, we should hesitate in giving countenance to such an irregularity, as to hold that any person whose name is written on the back of a note should be chargeable as a promisor. We should say that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete or within the Statute of Frauds; or that he should be treated by third parties simply as a second indorser; leaving the payee and himself to settle their respective liabilities, according to their own agreement. But the validity of such contracts has been so long established, and the course of decisions, on the whole, so uniform, that we have now only to apply the law, as it has been previously settled, in order to decide the present suit." The learned judge then proceeds to a minute examination of the cases previously decided on the point in Massachusetts, and arrives at the conclusion stated above.

[1] Nelson *v.* Dubois, 13 Johns. 175; Herrick *v.* Carman, 12 id. 160; Hall *v.* Newcomb, 7 Hill, 422, per *Bockee*, Senator. But see cases *supra*.

[2] Tenney *v.* Prince, 4 Pick. 385. In this case, A gave B a negotiable promissory note, payable in twelve months, and, three months before it fell due, C indorsed it in blank. It was *held* that B could not declare upon C's indorsement as an original promise, but that he might maintain an action upon it as a guaranty, upon showing a legal consideration. And see, to the same effect, Benthall *v.* Judkins, 13 Met. 265; Mecorney *v.* Stanley, 8 Cush. 85.

require; but either the original consideration or a new one must attach to him to affect him with a legal obligation.[1]

If the words "to order," or "to bearer," are omitted accidentally, and by mistake, it seems that they may be afterwards inserted without injury to the bill or note;[2] and whether a bill or note is negotiable or not, is held to be a question of law.[3]

By the law-merchant, bills and notes which are payable to order, can be effectually and fully transferred only by indorsement. This indorsement may be *in blank*, or *in full*. The writing of the name of a payee — either the original payee or an indorsee — with nothing more, is an indorsement in blank; and a blank indorsement makes the bill or note transferable by delivery, in like manner as if it had been originally payable to bearer. If the indorsement consist not only of the name, but of an order above the name to pay the note to some specified person, then it is an indorsement in full, and the note can be paid to no one else; nor can the property in it be fully transferred, except by the indorsement of the indorsee; and he may again indorse it in blank or in full. If the indorsement is, pay to A B *only*, or in equivalent words, A B is indorsee, but cannot indorse it over.[4]

Any holder for value of a bill or note indorsed in blank, whether he be the first indorsee or one to whom it has come through many hands, may write over any name indorsed, an order to pay the contents to himself, and this makes it a special indorsement, or an indorsement in full. This is often done for security; that is, to guard against the loss of the note by accident or theft. For the rule of law is, that negotiable paper transferable by delivery, (whether payable to bearer or indorsed in blank,) is, like money, the property of whoever receives it in good faith.[5] The same rule has been extended in England to exchequer bills;[6] to public bonds payable to bearer;[7] and to East India bonds;[8] and we think it would extend here to our railroad

[1] Josselyn *v.* Ames, 3 Mass. 274; Hall *v.* Newcomb, 3 Hill, 233; Seabury *v.* Hungerford, 2 Hill, 84.
[2] Kershaw *v.* Cox, 3 Esp. 246.
[3] Grant *v.* Vaughan, 3 Burr. 1516.
[4] Ancher *v.* Bank of England, Doug. 637; Edie *v.* East India Co. 2 Burr. 1227; Cramlington *v.* Evans, 2 Vent. 307; Treuttel *v.* Barandon, 7 Taunt. 100.
[5] Miller *v.* Race, 1 Burr. 452.
[6] Wookey *v.* Pole, 4 B. & Ald. 1.
[7] Gorgier *v.* Mieville, 3 B. & Cr. 45.
[8] Stat. 51 Geo. 3, c. 64.

and other corporation bonds, and, perhaps, to all such instruments as are payable to bearer, whether sealed or not, and whatever they may be called.[1] If one has such an instrument, and it is stolen, and the thief passes it for consideration to a *bonâ fide* holder, this holder acquires a legal right to it, because the property and possession go together. But if the bill or note be specially indorsed, no person can acquire any property in it, except by the indorsement of the special indorsee. It is said, however, that this precaution protects only the party who has thus made himself a special indorsee; and that the former parties remain liable in the same way as if the indorsement continued blank.[2]

At one time, this acquirement of property in negotiable paper was defeasible by proof of want of care; that is, if a holder lost his note, and a thief or finder passed it off to a *bonâ fide* holder, the property did not pass if the circumstances were such as to show negligence on the part of the purchaser, or a want of due inquiry.[3] But this question of negligence seems now to be at an end, and nothing less than fraud defeats the title of the purchaser.[4]

The written transfer of negotiable paper is called an indorse-

[1] See State of Illinois *v.* Delafield, 8 Paige, 527.

[2] Byles on Bills, 115; Smith *v.* Clark, Peake, 225; Walker *v.* McDonald, 2 Exch. 527.

[3] The doctrine alluded to in the text was established by the case of Gill *v.* Cubitt, 3 B. & Cr. 466. There, a bill of exchange was stolen during the night, and taken to the office of a discount broker early on the following morning, by a person whose features were known, but whose name was unknown to the broker, and the latter being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it. *Held,* in an action on the bill by the broker against the acceptor, that the jury were properly directed to find a verdict for the defendant if they thought the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man.

[4] Gill *v.* Cubitt, *supra,* was finally overruled in Goodman *v.* Harvey, 4 Ad. & El. 870. It was there held that, in an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill; that the question whether or not he was guilty of gross negligence is improper; that gross negligence may be evidence of *mala fides,* but is not equivalent to it. And Lord *Denman* said: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only, would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides,* but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any evidence of bad faith in him, there is no objection to his title." This case has been uniformly adhered to in England ever since; but it was disapproved of by the Superior Court of the city of New York, in Pringle *v.* Phillips, 5 Sandf. 157, and a determination declared to adhere to Gill *v.* Cubitt.

ment, because it is almost always written on the back of the note; but it has its full legal effect if written on the face.[1]

Joint payees of a bill or note, who are not partners, must all indorse.[2]

An indorser may always prevent his own responsibility by writing "without recourse," or other equivalent words, over his indorsement;[3] and any bargain between the indorser and indorsee, written or oral, that the indorser shall not be sued, is available against that indorsee, but not against subsequent indorsees without notice.[4]

A bill or note may be indorsed conditionally; and an acceptor of a bill so indorsed, who paid it before such condition is satisfied or complied with, has been held to pay it again after the condition is performed.[5]

Every indorsement and acceptance admits conclusively the signature of every party who has put his name upon the bill previously in fact, and is also previous in order.[6] Thus, an acceptance admits the signature of the drawer, but not the signature of one who actually indorses before acceptance, because *acceptance* is in its nature prior to indorsement.[7]

If a holder strike out an indorsement by mistake, he may restore it;[8] if on purpose, the indorser is permanently discharged.[9] If the plaintiff, in his declaration, derives his title through all the previous indorsements, all must be there, and proved.[10] But a holder may bring his action against any prior indorser, and fill any blank indorsement specially to himself, and sue accordingly; but then he invalidates the subsequent indorsements.[11] The

[1] Yarborough *v.* Bank of England, 16 East, 6.
[2] Carvick *v.* Vickery, Doug. 653; Bennett *v.* M'Gaughy, 3 How. (Miss.) 192.
[3] Richardson *v.* Lincoln, 5 Met. 201; Goupy *v.* Harden, 7 Taunt. 159.
[4] Pike *v.* Street, M. & M. 226.
[5] Robertson *v.* Kensington, 4 Taunt. 30.
[6] Lambert *v.* Oakes, 1 Ld. Raym. 443, 12 Mod. 244; Lambert *v.* Pack, 1 Salk. 127; Free *v.* Hakins, Holt, N. P. 550; Critchlow *v.* Parry, 2 Campb. 182.
[7] Smith *v.* Chester, 1 T. R. 654.
[8] Raper *v.* Birkbeck, 15 East, 17; Novelli *v.* Rossi, 2 B. & Ad. 757; Wilkinson *v.* Johnson, 3 B. & Cr. 428.
[9] Byles on Bills, 118.
[10] Thus, in an action against the maker of a promissory note, payable to A B or bearer, if the declaration states that A B indorsed it to the plaintiff, this indorsement must be proved. Waynam *v.* Bend, 1 Campb. 175.
[11] And the subsequent indorsements must be struck out. But this may be done at the trial. Cocks *v.* Borradaile, Chitty on Bills, 642. In this case, *Abbott*, C. J., said: "All the indorsements must be proved, or struck out, although not stated in the declaration. I remember Mr. Justice *Bayley* so ruling, and striking them out himself on the

reason is, that he takes from them all right to indorse; thus, for example, if A makes a note to B, and B, C, D, E, and F indorse it in blank, and G, the holder, writes over C's name, "pay to G," it is as if C had written this himself; and then G only could indorse, and, of course, D, E, and F could not, as they were mere strangers. And a holder precludes himself from taking advantage of the title of any party whose indorsement is thus avoided. Nor can he strike out the name of any indorser prior to that one whom he makes defendant; for, by so doing, he deprives the defendant of his right to look to the party whose name is stricken out, and this discharges the defendant.[1]

One may make a note or bill payable to his own order, and indorse it in blank; and this is now very common in our commercial cities, because the holder of such a bill or note can transfer it by delivery, and it needs not his indorsement to make it negotiable further.[2]

A transfer by delivery, without indorsement, of a bill or note payable to bearer, or indorsed in blank, does not generally make the transferrer responsible to the transferree for the payment of the instrument. Nor has the transferree a right to fall back, in case of non-payment, upon the transferrer for the original consideration of the transfer, if the bill were transferred in good faith, in exchange for money or goods; for such transfer would be held to be a sale of the bill or note, and the purchaser takes it with all risks.[3] But it seems not to be so where such a note is delivered

trial; and this need not be done before the trial." And see Mayer *v.* Jadis, 1 M. & Rob. 247. If there are intermediate indorsements between the payee and the defendant, these need not be stated; but the plaintiff may state in his declaration that the payee indorsed to the defendant. Chaters *v.* Bell, 4 Esp. 210.

[1] Curry *v.* Bank of Mobile, 8 Porter, 360.

[2] See Flight *v.* Maclean, 16 M. & W. 51; Wood *v.* Mytton, 10 Q. B. 805; Hooper *v.* Williams, 2 Exch. 13; Brown *v.* De Winton, 6 C. B. 342; Gay *v.* Lander, 6 C. B. 336.

[3] "It is extremely clear," said Lord *Kenyon*, in Fenn *v.* Harrison, 3 T. R. 759, "that, if the holder of a bill send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill." So, where a party discounted bills with bankers, and received, in part of the discount, other bills, but not indorsed by the bankers, which bills turned out to be bad, it was held that the bankers were not liable. "Having taken them without indorsement," said Lord *Kenyon*, "he hath taken the risk on himself. The bankers were the holders of the bills, and by not indorsing them, have refused to pledge their credit to their validity; and the transferree must be taken to have received them on their own credit only." So, in Bank of England *v.* Newman, 1 Ld. Raym. 442, where the defendant had discounted with the plaintiffs a bill payable to bearer, without indorsing it, and payment of the bill was afterwards refused, it was held that the plaintiffs could not maintain an action against

either in payment or by way of security for a previously existing debt.[1] Then, if the transferrer has lost nothing by the reception of the note by the transferree, because if he had continued to hold the note, he would have lost it, there seems to be no reason why the transferree should lose it. We have no doubt that such a transferrer may make himself liable, without indorsement, by express contract; and that circumstances might warrant and require the implication that the bill or note so transferred remained, by the agreement and understanding of both parties, at the risk of the transferrer.[2] And every such transferrer warrants that the bill or note (or bank-note) is not forged or fictitious.[3]

An indorsement may be made on the paper before the bill or note is drawn; and such indorsement, says Lord Mansfield, "is a letter of credit for an indefinite sum, and it will not lie in the indorser's mouth to say that the indorsements were not regular."[4] The same rule applies to an acceptance on blank paper.[5] So, an indorsement may be made after or before acceptance. If made after a refusal of acceptance, which is known to the indorsee, he takes only the title of the indorser, and is subject to all defences available against him.[6]

the defendant to recover back the money paid to him. And *Holt*, C. J., said: "If a man has a bill payable to him or bearer, and he delivers it over for money received, without indorsement of it, this is a plain sale of the bill, and he who sells it does not become a new security. But if he had indorsed it, he had become a new security, and then he had been liable on the indorsement." And see *Ex parte* Shuttleworth, 3 Ves. 368; Emly *v.* Lye, 15 East, 7.

[1] Thus, in Ward *v.* Evans, 2 Ld. Raym. 928, it was argued, by *Darnall*, Sergeant, "that if A sells goods to B for £50, and at the same time B gives A a note for £50, and A accepts it, this is an actual payment, although the note be never received, because it shall be taken as part of the contract that A was to accept such note in satisfaction for his goods. But where there is a precedent debt or duty, such note will not amount to payment till it be paid, unless there be any negligence and delay in the party who takes the note, in going to receive it." And *Holt*, C. J., said: "I agree in the difference taken by my brother *Darnall*, that taking a note for goods sold is a payment, because it was part of the original contract; but paper is no payment where there is a precedent debt. For, when such a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time." And see, to the same effect, Moore *v.* Warren, 1 Strange, 415; Holme *v.* Barry, id.; Camidge *v.* Allenby, 6 B. & Cr. 373.

[2] See Byles on Bills, 124.

[3] Gurney *v.* Womersley, 1 Jur. N. S. 328, 4 El. & Bl. 133; Gompertz *v.* Bartlett, 2 El. & Bl. 849; Jones *v.* Ryde, 5 Taunt. 488; Young *v.* Cole, 3 Bing. N. C. 724.

[4] Russel *v.* Langstaffe, Doug. 514. And see Collis *v.* Emett, 1 H. Bl. 313; Schultz *v.* Astley, 2 Bing. N. C. 544; Montague *v.* Perkins, 22 L. J., C. P. 187. But see Hatch *v.* Searles, 2 Sm. & Gif. 147; Awde *v.* Dixon, 6 Exch. 869.

[5] See cases *supra*.

[6] Crossley *v.* Ham, 13 East, 498. But if the indorsee had no notice of the refusal to accept, he will not be prejudiced by it. Thus, in O'Keefe *v.* Dunn, 6 Taunt. 305, 5 M. & S. 282, the payee of a bill of exchange presented it for acceptance, which was refused.

A bill or note once paid at or after maturity, ceases to be negotiable, in reference to all who could be prejudiced by its transfer.[1] So, where a bill drawn payable to a third person, by whom it is indorsed, is dishonored and taken up by the drawer, it ceases to be a negotiable instrument; for the drawer has no title to indorse it.[2] But if one draw a bill payable *to his own order*, and indorse it over, and, upon the bill's being dishonored, take it up, he may indorse it again, and this last indorsee can recover against the acceptor.[3] And if a bill or note is paid before it is due, it is valid in the hands of a subsequent *bonâ fide* indorsee.[4]

A portion of a negotiable bill or note cannot be transferred so as to give the transferree a right of action for that portion in his own name.[5] But if the bill or note be partly paid, it may be indorsed over for the balance.[6] If an action be brought on the bill or note, no transfer during the pendency of such action gives to the transferree a right of action, unless he was ignorant of the action; then the transfer is valid.[7]

After a holder's death, his personal representative should transfer.[8] But it seems that if a note needing indorsement, was in-

He neglected to advise the drawer, and thereby discharged the drawer as between the drawer and himself. He then indorsed the bill without informing his indorsee of the refusal to accept. *Held*, that the discharge to the drawer extended only to an action at the suit of the party guilty of the neglect; and that the indorsee having had no notice of the dishonor, the same defence was not available against him as against his indorser.

[1] Bartrum *v.* Caddy, 9 Ad. & El. 275; Lazarus *v.* Cowie, 3 Q. B. 459; Eaton *v.* McKown, 34 Maine, 510; Cochran *v.* Wheeler, 7 N. H. 202.

[2] Bacon *v.* Searls, 1 H. Bl. 89, n.; Price *v.* Sharp, 2 Iredell, 417.

[3] Hubbard *v.* Jackson, 4 Bing. 390; Callow *v.* Lawrence, 3 M. & S. 95. In this last case, Lord *Ellenborough* said: "A bill of exchange is negotiable *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers." But this language, as we have seen, must be taken with some qualifications. See cases in preceding note.

[4] "I agree," said Lord *Ellenborough*, in Burridge *v.* Manners, 3 Campb. 193, "that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills of exchange and promissory notes; for it would be impossible to know whether there had not been an anticipated payment of them."

[5] Hawkins *v.* Cardy, 1 Ld. Raym. 360.

[6] Id.

[7] Marsh *v.* Newell, 1 Taunt. 109; Jones *v.* Lane, 3 Y. & C. 281; Colombier *v.* Slim, Chitty on Bills, 217.

[8] Rawlinson *v.* Stone, 3 Wils. 1; Watkins *v.* Maule, 2 Jac. & Walk. 237, 243; Rand *v.* Hubbard, 4 Met. 252, 258.

dorsed by the holder, but not delivered, the executor cannot complete the transfer by delivery.[1] The husband who acquires a right to a bill or a note given to the wife, either before or after marriage, may indorse.[2]

One who may claim payment of a bill or note, and of whom payment may also be demanded, or one who is liable to contribute for the payment of a note, cannot sue upon it. But if only the technical rule — that the same party cannot be plaintiff and defendant — prevents the action, it may be avoided by indorsement over to another before maturity.[3]

SECTION VII.

OF THE RIGHTS AND DUTIES OF THE ACCEPTOR.

Acceptance applies to bills and not to notes. It is an engagement of the person on whom the bill is drawn to pay it according to its tenor. The usual way of entering into this agreement, or of accepting, is by the drawee's writing his name across the face of the bill, and writing over it the word "accepted." But any other word of equivalent meaning may be used, and it may be written elsewhere, and it need not be signed, or the drawee's name alone on the bill may be enough.[4] But if accepted irregularly, or in an unusual way, the question whether it were accepted would generally go to a jury under the direction of the court.[5] A written promise to accept a future bill, if it distinctly define and describe that very bill, has been held in this country as the equivalent of an acceptance, if the bill was taken on the credit of such promise.[6] But this doctrine of virtual acceptance should,

[1] Bromage *v.* Lloyd, 1 Exch. 32.

[2] Conner *v.* Martin, 3 Wil. 5, 1 Strange, 516; Barlow *v.* Bishop, 1 East, 432; Mason *v.* Morgan, 2 Ad. & El. 30.

[3] Morley *v.* Culverwell, 7 M. & W. 174; Steele *v.* Harmer, 14 M. & W. 831, 4 Exch. 1.

[4] Anonymous, Comb. 401; Powell *v.* Monnier, 2 Atk. 611; Dufaur *v.* Oxenden, 1 M. & Rob. 90.

[5] Id.

[6] Coolidge *v.* Payson, 2 Wheat. 66; Schimmelpennich *v.* Bayard, 1 Pet. 264; Boyce *v.* Edwards, 4 id. 121. And in New York it has been declared by statute, that "an unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance, in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration." 1 R. S. 768, § 8.

perhaps, have no application to a bill drawn payable at some fixed period *after sight*.[1] In England and in this country, generally, an acceptance may be by parol.[2] And it is said that a promise, whether written or verbal, to *pay* an existing bill, is an acceptance.[3] But the language, whether oral or written, although no form be prescribed for it, must not be ambiguous.[4] It must distinctly import acceptance, or an agreement to do what acceptance would bind the party to do; and *mere detention* of the bill is not acceptance.[5]

An acceptance admits the signature and capacity of the drawer;[6] and the capacity *at that time* of the payee to indorse, which is also admitted by the maker of a promissory note; and this cannot be denied, although the payee be an infant, a married woman, or a bankrupt.[7] But the acceptance does not admit the validity of an existing indorsement;[8] nor, if it be by an agent, his authority;[9] if, however, the acceptor knew that the indorsement was forged or made without authority, he cannot use the fact in his defence.[10] But if the bill is drawn in a fictitious name,

[1] Per *Story*, J., in Wildes *v.* Savage, 1 Story, 22. And see Russell *v.* Wiggin, 2 Story, 213.

[2] Lumley *v.* Palmer, 2 Strange, 1000; Rex *v.* Maggott, Chitty on Bills, 288; Julian *v.* Schobrooke, 2 Wil. 9; Powell *v.* Monnier, 2 Atk. 611; Sproat *v.* Matthews, 1 T. R. 182; Clarke *v.* Cock, 4 East, 72; Edson *v.* Fuller, 2 Fost. 183. But in New York it is declared by statute, that "no person within that State shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent; and if such acceptance be written on a paper, other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration." 1 R. S. 768, §§ 6, 7.

[3] Clark *v.* Cock, 4 East, 72; Wynne *v.* Raikes, 5 id. 514; Edson *v.* Fuller, 2 Fost. 183.

[4] Rees *v.* Warwick, 2 B. & Ald. 113. In this case, the drawer of a bill wrote to the drawee, stating that he had valued on him for the amount, and added, "which please to honor;" to which the drawee answered, "the bill shall have attention." *Held*, that these words were ambiguous and did not amount to an acceptance of the bill. And *Abbott*, C. J., said: "The phrase 'shall have attention,' is at least ambiguous; it may mean that the defendant would examine and inquire into the state of the accounts between them, for the purpose of ascertaining whether he would accept the bill or not. If, indeed, it could have been shown that these words, either generally in the mercantile world, or as between these individual parties, meant an acceptance of the bill to which they related, the case would have been different. But that has not been done." And see Powell *v.* Jones, 1 Esp. 17.

[5] Mason *v.* Barff, 2 B. & Ald. 26.

[6] Wilkinson *v.* Lutwidge, 1 Strange, 648; Jenys *v.* Fawler, 2 id. 946; Price *v.* Neale, 3 Burr. 1354; Bass *v.* Clive, 4 M. & S. 15; Smith *v.* Mercer, 6 Taunt. 76; Robinson *v.* Reynolds, 2 Q. B. 196; Canal Bank *v.* Bank of Albany, 1 Hill, 287.

[7] Drayton *v.* Dale, 2 B. & Cr. 293; Braithwaite *v.* Gardiner, 8 Q. B. 473; Taylor *v.* Croker, 4 Esp. 187; Hallifax *v.* Lyle, 3 Exch. 446; Smith *v.* Marsack, 6 C. B. 486.

[8] Smith *v.* Chester, 1 T. R. 654; Beeman *v.* Duck, 11 M. & W. 251; Tucker *v.* Robarts, 18 L. J., Q. B. 169.

[9] Robinson *v.* Yarrow, 7 Taunt. 455.

[10] Beeman *v.* Duck, 11 M. & W. 251.

the acceptor is said to be bound to pay on an indorsement by the same hand.[1] But a bill drawn and indorsed in a fictitious name, with the knowledge of the drawer, may, and perhaps should be, declared on as payable to bearer.[2] In general, any party who gives credit and circulation to negotiable paper, admits, so far as he is concerned, all properly antecedent names.[3]

A banker is liable to his customer without acceptance, if he refuses to pay checks drawn against funds in his hands.[4] So it seems that a banker, at whose house a customer, accepting a bill, makes it payable, is liable to an action at the suit of the customer, if he refuse to pay it, having at the time of presentment sufficient funds, and having had those funds a reasonable time, so that his clerks and servants might know it.[5] But he is not liable to the holder of the bill for money had and received, even if funds have been remitted to meet it, unless he has assented to hold and apply them for that purpose;[6] but that assent may be implied from usage or circumstances. And the banker has authority from the bill itself to apply to its payment the funds of the acceptor.[7]

There cannot be two or more acceptors of the same bill not jointly responsible, as partners are.[8] If accepted by a part only of those jointly responsible, or joint drawers, it may be treated as dishonored; but if not so treated, the parties accepting will be bound.

An acceptance may be made after maturity, and will be treated as an acceptance to pay on demand; and if the words "accord-

[1] Cooper *v.* Meyer, 10 B. & Cr. 468; Beeman *v.* Duck, 11 M. & W. 251.
[2] Gibson *v.* Minet, 1 H. Bl. 569; Beeman *v.* Duck, 11 M. & W. 251.
[3] See *ante*, p. 124, n. 6.
[4] Marchetti *v.* Williams, 1 B. & Ad. 415; Rolin *v.* Steward, 14 C. B. 595.
[5] Whitaker *v.* The Bank of England, 1 Cr. M. & Ros. 744.
[6] Williams *v.* Everett, 14 East, 582; Yates *v.* Bell, 3 B. & Ald. 643.
[7] Kymer *v.* Laurie, 18 L. J., Q. B. 218.
[8] Jackson *v.* Hudson, 2 Camp. 447. In this case, the plaintiff and one Irving having dealings together, the plaintiff refused to supply Irving with goods, unless the defendant would become his surety. The defendant agreed to do it. Goods to the value of £157 were accordingly supplied. For the amount the plaintiff drew a bill on Irving, which was accepted both by Irving and the defendant, each writing his name on it. In an action on the bill against the defendant as acceptor, the plaintiff was nonsuited. And Lord *Ellenborough* said: "If you had declared that, in consideration of the plaintiff selling the goods to Irving, the defendant undertook that the bill should be paid, you might have fixed him by this evidence. But I know of no custom or usage of merchants, according to which, if a bill be drawn upon one man, it may be accepted by two. The acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for the honor of the drawer. There cannot be a series of acceptors."

ing to the tenor and effect of the bill," or like words, are used, they will be regarded as of no effect.[1]

The acceptance may be cancelled by the holder; and if voluntary and intended, this cancelling is complete and effectual; but if made by mistake, by him or other parties, and this can be shown, the acceptor is not discharged.[2] And if the cancelling be by a third party, it is for the jury to say whether the holder authorized or assented to it.[3]

The liability of an acceptor or maker is destroyed by receiving from him a coextensive or greater security by specialty, unless it is distinctly agreed and declared that the bill or note remains in force.[4]

If a qualified acceptance be offered, the holder may accept or refuse it. If he refuses it, he may treat the bill as dishonored; if he accepts it, he should notify antecedent parties, and obtain their consent; without which they are not liable.[5] But if he protests the bill as dishonored, for this reason, he cannot hold the acceptor upon his conditional acceptance.[6]

A bill can be accepted only by the drawee — in person or by his authorized agent — or by *some one who accepts for honor*.[7] And a bill drawn on one incompetent to contract, as from infancy, coverture, or lunacy, may be treated as dishonored.[8]

SECTION VIII.

OF ACCEPTANCE FOR HONOR.

If a bill be protested for non-acceptance or for better security, any person may accept it, for the honor either of the drawer or of any indorser. This he should distinctly express at the time

[1] Jackson *v.* Pigott, 1 Ld. Raym. 364; Mutford *v.* Walcot, id. 574; Williams *v.* Winans, 2 Green, 339.

[2] Wilkinson *v.* Johnson, 3 B. & Cr. 428; Raper *v.* Birkbeck, 15 East, 17. And see *ante*, p. 124, n. 8.

[3] Sweeting *v.* Halse, 9 B. & Cr. 365.

[4] Twopenny *v.* Young, 3 B. & Cr. 208.

[5] Sebag *v.* Abitbol, 4 M. & S. 462, per *Bayley*, J.; Boehm *v.* Garcias, 1 Campb. 425; Gammon *v.* Schmoll, 5 Taunt. 353, per *Chambre*, J.

[6] Sproat *v.* Matthews, 1 T. R. 182; Bentinck *v.* Dorrien, 6 East, 200.

[7] Polhill *v.* Walter, 3 B. & Ad. 114; Davis *v.* Clarke, 6 Q. B. 16.

[8] Chitty on Bills, 310, (8th ed.)

when he makes his acceptance, before a notary-public, and it should be noted by him.[1] A general acceptance *supra* protest, for honor, is taken to be for honor of the drawer.[2] The drawee himself, refusing to accept it generally, may thus accept for the honor of the drawer or an indorser.[3] And after a bill is accepted for honor of one party, it may be accepted by another person for honor of another party.[4] And an acceptance for honor may be made at the intervention and request of the drawee.[5]

No holder is obliged to receive an acceptance for honor; he may refuse it wholly.[6] If he receive it, he should, at the maturity of the bill, present it for payment to the drawee who may have been supplied with funds in the mean time.[7] If not paid, the bill should be protested for non-payment, and then presented for payment to the acceptor for honor.[8]

The undertaking of the acceptor for honor is collateral only; being an engagement to pay if the drawee does not.[9] It can

[1] In Beawes' Lex Mercatoria, 5th ed. p. 435, pl. 38, it is said: "The method of accepting *supra* protest is as follows, namely: the acceptor must personally appear before a notary-public with witnesses, whether the same that protested the bill or not, is of no importance, and declare that he doth accept such protested bill in honor of the drawer, or indorser, &c., and that he will satisfy the same at the appointed time; and then he must subscribe the bill with his own hand, thus: "Accepted, *supra* protest, in honor of T. B., &c."

[2] Chitty on Bills, 376, (8th ed.); Beawes, pl. 39.

[3] Beawes, pl. 33.

[4] Beawes, pl. 42.

[5] Konig *v.* Bayard, 1 Pet. 250.

[6] Mitford *v.* Walcott, 12 Mod. 410; Gregory *v.* Walcup, Com. 67; Pillans *v.* Van Mierop, 3 Burr. 1663.

[7] In Hoare *v.* Cazenove, 16 East, 391, it was held that the acceptors of a foreign bill of exchange, who, after presentment to the drawees for acceptance, and a refusal by them to accept, and protest for non-acceptance, accept the same for the honor of the first indorsers, are not liable on such acceptance, unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment. And Lord *Ellenborough* said: "The reason of the thing, as well as the strict law of the case, seems to render a second resort to the drawee proper, when the unaccepted bill still remains with the holder; for effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again when the period of payment had arrived. And the drawer is entitled to the chance of benefit to arise from such second demand, or at any rate to the benefit of that evidence which the protest affords, that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort."

[8] Williams *v.* Germaine, 7 B. & Cr. 468; Mitchell *v.* Baring, 10 id. 4. And see preceding note.

[9] In Williams *v.* Germaine, 7 B. & Cr. 477, Lord *Tenterden*, after citing Hoare *v.* Casenove, *supra*, said: "The result, as it seems to me, of the decision to which I have alluded is, that an acceptance for honor is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, 'Keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money.' This appears to me to be a very sensible interpretation of the nature of acceptances for honor, where the parties say nothing upon the subject."

only be made for some party who will certainly be liable if the bill be not paid; because, by an acceptance properly made, for honor, *supra* protest, such acceptor acquires an absolute claim against the party for whom he accepts, and against all parties to the bill antecedent to him, for all his lawful costs, payments, and damages, by reason of such acceptance.[1] If a third party takes up a bill at its maturity for the honor of the drawer and at his request, he discharges an accommodation acceptor for honor although he may not have intended doing so.[2]

[1] Chitty on Bills, 352.

[2] In an action by A against B, the acceptor of a bill drawn by C in favor of D, and indorsed by D to A, it appeared on the trial that B was an accommodation acceptor of C; and the court instructed the jury that if they believed, from the evidence, that the plaintiff took up the bill at its maturity at the request of C, the drawer, and for his benefit, it was a payment of the bill, and they must find for the defendant, whether A and C intended to release B, the acceptor, or not. It is certain that, if the drawer had taken up the bill himself, no action would lie upon it, and a third party, taking it up for him, must occupy the same position. McDowell *v.* Cook, 6 Sm. & M. 420; *Ex parte* Lambert, 13 Ves. 179.

CHAPTER X.

AGENCY.

SECTION I.

OF AGENCY IN GENERAL.

The relation of principal and agent implies that the principal acts by and through the agent, so that the acts in fact of the agent are the acts in law of the principal; and only when one is authorized by another to act for him in this way and to this extent, is he an agent. One may act as the agent of another who is disqualified from contracting on his own account; as infants, married women, and aliens.[1]

A principal is responsible for the acts of his agent, not only when he has actually given full authority to the agent thus to represent and act for him, but when he has, by his words, or his acts, or both, caused or permitted the person with whom the agent deals, to believe him to be clothed with this authority. And a man may be thus held as a principal, because he has in some way justified all persons in believing that he has constituted some other man his agent, or because he has justified only the party dealing with the supposed agent, in so believing. For all responsibility rests upon two grounds, which are commonly united, but either of which is sufficient; one, the giving of actual authority; the other, such appearing to give authority as justifies those who deal with the supposed agent, in believing that he possesses this authority.[2]

A general agent is one authorized to represent his principal in

[1] Co. Litt. 52, a; Bac. Abr. Authority, (B.); Com. Dig. Attorney, (C. 4.) A wife may act as the agent of her husband. Hopkins *v.* Mollinieux, 4 Wendell, 465. A slave may be an agent. Chastain *v.* Bowman, 1 Hill, (So. Car.) 270; Gore *v.* Buzzard, 4 Leigh, 231; The Governor *v.* Daily, 14 Ala. 469.

[2] Davis *v.* Lane, 10 N. H. 156; Beard *v.* Kirk, 11 id. 397; Dispatch Line of Packets *v.* Bellamy Manuf. Co. 12 id. 224; Bulkley *v.* The Derby Fishing Co. 2 Conn. 259.

all his business, or in all his business of a particular kind. A particular agent is one authorized to do only a specific or a few specified things.[1] It is not always easy to discriminate between these; but it is often important; by reason of the rule, that the authority of a *general* agent is measured by the usual scope and character of the business he is empowered to transact.[2] By appointing him to do that business, the principal is considered as saying to the world that his agent has all the authority necessary to the doing of it in the usual way. And if the agent transcends his actual authority, but does not go beyond the natural and usual scope of the business, the principal is bound, unless the party with whom the agent dealt knew that the agent exceeded his authority.[3] For, if an agent does only what is natural and usual in transacting business for his principal, and yet goes beyond the limits prescribed by him, it is obvious that the principal must have put particular and unusual limitations to his authority; and these cannot affect the rights of a third party who deals with the agent in ignorance of these limitations. But, on the other hand, the rule is, that if an agent who is specially authorized to do a specific thing, exceeds his authority, the principal is not bound; because the party dealing with such agent must inquire for himself, and at his own peril, into the authority given to the agent. Here, however, as before, if the party dealing with the agent, and inquiring, as he should, into his authority, has sufficient evidence of this authority furnished to him by the principal, and, in his dealings with the agent, acts within the limits of the authority thus proved, he cannot be affected by any reservations and limitations made secretly by the principal, and wholly unknown to the person dealing with the agent.[4]

[1] Whitehead *v.* Tuckett, 15 East, 400; Anderson *v.* Coonley, 21 Wend. 279; Trundy *v.* Farrar, 32 Maine, 225. If an agency be proved, without its extent being shown, it is presumed to be a general agency. Methuen Co. *v.* Hayes, 33 Maine, 169.

[2] Pickering *v.* Busk, 15 East, 38; Whitehead *v.* Tuckett, id. 400; Saltus *v.* Everett, 20 Wend. 267; Lobdell *v.* Baker, 1 Met. 202.

[3] Smethurst *v.* Taylor, 12 M. & W. 545; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. 361; Lighthody *v.* North American Ins. Co. 23 Wend. 22; Lobdell *v.* Baker, 1 Met. 202; Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 501; Johnson *v.* Jones, 4 Barb. 369; Bryant *v.* Moore, 26 Maine, 84; Hatch *v.* Taylor, 10 N. H. 550, 551. It is not necessary, in order to authorize the inference of general agency, that the person should have done an act the same in *specie;* but it is sufficient if he has done things of the same general character with his principal's assent. Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 501.

[4] Hatch *v.* Taylor, 10 N. H. 538; Bryant *v.* Moore, 26 Maine, 84; McClung *v.*

SECTION II.

HOW AUTHORITY MAY BE GIVEN TO AN AGENT.

It may be given under seal, in writing without seal, or orally. And an oral appointment authorizes the agent to make a written contract,[1] but not to execute instruments under seal.[2] Nor, as it seems, if an agent has parol authority to make a contract, and affixes a seal to it, will the seal be treated as a nullity, in order to give to the instrument the effect of a simple contract.[3] But an instrument under seal, executed in the principal's presence, and by his request and authority, will be regarded as the principal's deed, made by himself.[4] One employed by another to act for him in the usual trade or business of the agent, as auctioneer, broker, or the like, acquires thereby authority to do all that is necessary or usual in that business.[5]

If one is repeatedly employed to do certain things — as a wife,[6]

Spotswood, 19 Ala. 165. In both general and special agencies, a power to do an act includes authority to execute the usual and necessary measures to accomplish it. Valentine *v.* Piper, 22 Pick. 92; Goodale *v.* Wheeler, 11 N. H. 428, 429; Anderson *v.* Coonley, 21 Wend. 279; Yerby *v.* Grigsby, 9 Leigh, 387.

[1] Anonymous, 12 Mod. 564; Coles *v.* Trecothick, 9 Ves. 234, 250; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Ewing *v.* Tees, 1 Binn. 450; Trundy *v.* Farrar, 32 Maine, 225. And this is so, even where the contract is required to be in writing by the Statute of Frauds. Maclean *v.* Dunn, 4 Bing. 722; Shaw *v.* Nudd, 8 Pick. 9; Merritt *v.* Clason, 12 Johns. 102; M'Comb *v.* Wright, 4 Johns. Ch. 659; Ewing *v.* Tees, 1 Binney, 450; Lawrence *v.* Taylor, 5 Hill, 107; Graham *v.* Musson, 5 Bing. N. C. 603; Yerby *v.* Grigsby, 9 Leigh, 387. Except in those cases where the statute expressly requires the authority to be in writing. Vanhorne *v.* Frick, 6 S. & R. 90.

[2] Co. Litt. 48, b; Gordon *v.* Bulkeley, 14 S. & R. 331; Hanford *v.* McNair, 9 Wend. 54; Blood *v.* Goodrich, 9 id. 68; Cooper *v.* Rankin, 5 Binn. 613; Gordon *v.* Bulkeley, 14 S. & R. 331; Plummer *v.* Russell, 2 Bibb, 174; Hatch *v.* Smith, 5 Mass. 52.

[3] Wheeler *v.* Morris, 34 Maine, 54. But see Worrall *v.* Munn, 1 Selden, 229; Lawrence *v.* Taylor, 5 Hill, 113; Milton *v.* Mosher, 7 Met. 244; Osborne *v.* Horner, 11 Iredell, 359.

[4] Gardner *v.* Gardner, 5 Cush. 483; Wood *v.* Goodridge, 6 id. 120; Kime *v.* Brooks, 9 Iredell, 218.

[5] "If a person put goods into the custody of another whose common business it is to sell without limiting his authority, he thereby confers an implied authority upon him to sell them." Per *Bayley*, J., in Pickering *v.* Busk, 15 East, 38. See Salters *v.* Everett, 20 Wend. 267, 281; Anderson *v.* Coonley, 21 id. 279; Valentine *v.* Piper, 22 Pick. 92; Goodale *v.* Wheeler, 11 N. H. 428, 429.

[6] Prestwick *v.* Marshall, 7 Bing. 565; Huckman *v.* Fernie, 3 M. & W. 505; Attorney-General *v.* Riddle, 2 C. & Jer. 493; Plimmer *v.* Sells, 3 N. & Mann. 422; Lord *v.* Hall, 8 C. B. 627; Renaux *v.* Teakle, 20 E. L. & Eq. 345. The wife is *primâ facie* the husband's agent in managing the affairs of the household. Pickering *v.* Pickering, 6 N. H. 124; Mackinley *v.* M'Gregor, 3 Whart. 369. The liability of a man for the

or a son,[1] to sign bills or receipts; or a domestic servant to make purchases; or a merchant or broker to sign policies, and the like;[2] in all these cases, one dealing with the person thus usually employed, is justified in believing him authorized to do those things, with the assent and approbation of his employer, and in the way in which he has done them; but not otherwise. Thus, if a servant is usually employed to buy, but always for cash, this implies no authority to buy on credit.[3]

An agency may be confirmed and established, and in fact created by a subsequent adoption and ratification;[4] but only where the act was done by one purporting to be an agent, or by an assumed authority.[5] Generally, one who receives and holds a beneficial result of the act of another as his agent, is not permitted to deny such agency;[6] and in some cases this is extended even to acts of such agent under seal.[7] And if one, knowing

acts of a woman not his wife, but with whom he cohabits as such, is similar. Watson *v.* Threlkeld, 2 Esp. 637; Robinson *v.* Nahon, 1 Camp. 245; Ryan *v.* Sams, 12 Q. B. 460. In the absence of the husband, the wife has a general authority, unless the husband has otherwise delegated it, to exercise usual and ordinary control over his property. Church *v.* Landers, 10 Wend. 79; Felker *v.* Emerson, 16 Vt. 653. But she has no implied authority to enter into extraordinary and unusual contracts. Webster *v.* M'Ginnis, 5 Binney, 235; Green *v.* Sperry, 16 Vt. 390; Benjamin *v.* Benjamin, 15 Conn. 347; Shelton *v.* Pendleton, 18 id. 417. As to the husband's liability for necessaries furnished to his wife, see 1 Parsons on Contracts, pp. 43, 287, 289–304.

[1] Watkins *v.* Vince, 2 Stark. 368.

[2] Brockelbank *v.* Sugrue, 5 C. & Payne, 21; Haughton *v.* Ewbank, 4 Campb. 88; Dows *v.* Greene, 16 Barb. 72.

[3] Rusby *v.* Scarlett, 5 Esp. 75; Flemyng *v.* Hector, 2 M. & W. 181, per Lord *Abinger*, C. B.

[4] Townsend *v.* Inglis, Holt, N. P. 278; Haughton *v.* Ewbank, 4 Campb. 88; Barber *v.* Gingell, 3 Esp. 60; Lucena *v.* Craufurd, 1 Taunt. 325; Clark's Ex'rs *v.* Van Riemsdyk, 9 Cranch, 158; Bell *v.* Cunningham, 3 Pet. 81; Bigelow *v.* Denison, 23 Vt. 564; Perry *v.* Hudson, 10 Geo. 362. Such ratification relates back to the original transaction. Lawrence *v.* Taylor, 5 Hill, 113; Perry *v.* Hudson, 10 Geo. 362; Dispatch Line, &c. *v.* Bellamy Manuf. Co. 12 N. H. 205. A corporation is bound by the ratification of an agent's act in the same manner as a private individual. Fleckner *v.* United States Bank, 8 Wheat. 363; Moss *v.* Rossie Lead Mining Co. 5 Hill, 137; Conro *v.* Port Henry Iron Co. 12 Barb. 27; Montgomery Railroad Co. *v.* Hurst, 9 Ala. 513; Church *v.* Sterling, 16 Conn. 388; Melledge *v.* Boston Iron Co. 5 Cush. 175. The ratification of the act of an agent not previously authorized, must, in order to bind the principal, be made with a full knowledge of all the material facts. Davidson *v.* Stanley, 2 M. & G. 721; Owings *v.* Hull, 9 Pet. 607; Robertson *v.* Ketchum, 11 Barb. 652; Culver *v.* Ashley, 19 Pick. 300; Bryant *v.* Moore, 26 Maine, 84; Johnson *v.* Wingate, 29 id. 404.

[5] Saunderson *v.* Griffiths, 5 B. & C. 909; Vere *v.* Ashby, 10 id. 288; Wilson *v.* Tumman, 6 M. & G. 242; Hull *v.* Pickersgill, 1 B. & Bing. 282; Foster *v.* Bates, 12 M. & W. 233.

[6] Bolton *v.* Hillersden, 1 Ld. Raym. 224, 225; Thorold *v.* Smith, 11 Mod. 72; Odiorne *v.* Maxcy, 13 Mass. 178; Willinks *v.* Hollingsworth, 6 Wheat. 240, 259; Forrestier *v.* Bordman, 1 Story, 43; Byrne *v.* Doughty, 13 Geo. 46.

[7] A parol ratification by the principal of instruments under seal, which need not have been under seal, has been held binding. Hunter *v.* Parker, 7 M. & W. 343; Dispatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. H. 205; Milton *v.* Mosher, 7

that another has acted as his agent, does not disavow the authority as soon as he conveniently can, but lies by and permits a person to go on and deal with the supposed agent, or to lose an opportunity of indemnifying himself, this is an adoption and confirmation of the acts of the agent.[1] Nor can a principal adopt a part, for his benefit, and repudiate the rest of the supposed agency; he must adopt the whole or none.[2] And if an agent makes a sale, and his principal ratifies the sale, he thereby ratifies the agent's representations made at the time of the sale and in relation to it, and is bound by them.[3] Nor can there be a ratification by one party of an act which creates a duty on the part of another, or a claim for damages against him; as a demand of money or property on which to ground trover[4] or to defeat a tender.[5]

The act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act as principal.[6]

The whole subject of mercantile agency is influenced and governed by mercantile usage. Thus, as to the distinction between factors and brokers, the law adopts a distinction usual among merchants, although it may be not always regarded by them. A factor is a mercantile agent, for sales and purchases, who has

Met. 244; Worrall *v.* Munn, 1 Selden, 229; Brutton *v.* Burton, 1 Chitty, 707. See Banorgee *v.* Hovey, 5 Mass. 11, 24. But, in general, an unauthorized instrument under seal, entered into by one as agent for another, can be ratified only by an instrument under seal. Steiglitz *v.* Egginton, Holt, N. P. 141; Hunter *v.* Parker, 7 M. & W. 322; Hanford *v.* McNair, 9 Wend. 54; Blood *v.* Goodrich, 12 id. 525, 9 id. 68; Stetson *v.* Patten, 2 Greenl. 358.

[1] Walsh *v.* Pierce, 12 Vt. 130; Bredin *v.* Dubarry, 14 S. & R. 27; Brigham *v.* Peters, 1 Gray, 139; Amory *v.* Hamilton, 17 Mass. 103; Johnson *v.* Jones, 4 Barb. 369; Fitzsimmons *v.* Joslin, 21 Vt. 129; Owsley *v.* Woolhopter, 14 Geo. 124; Perry *v.* Hudson, 10 Geo. 362; Davidson *v.* Stanley, 2 M. & G. 721; Pott *v.* Bevan, 1 C. & K. 335.

[2] Wilson *v.* Poulter, 2 Stra. 859; Smith *v.* Hodson, 4 T. R. 211; Hovil *v.* Pack, 7 East, 164; Brewer *v.* Sparrow, 7 B. & Cr. 310; Newell *v.* Hurlburt, 2 Vt. 351; Benedict *v.* Smith, 10 Paige, 126; Moss *v.* Rossie Lead Mining Co. 5 Hill, 137; Corning *v.* Southland, 3 Hill, 552; Crawford *v.* Barkley, 18 Ala. 270; Hodnett *v.* Tatum, 9 Geo. 70; Beckwith *v.* Baxter, 3 N. H. 67.

[3] Doggett *v.* Emerson, 3 Story, 700.

[4] Solomons *v.* Dawes, 1 Esp. 83.

[5] Cooke *v.* Callaway, 1 Esp. 115; Coles *v.* Bell, 1 Campb. 478, note. So, a notice to quit, given by an unauthorized agent, cannot be made good by the ratification of the principal after the proper time for giving it, the agent having acted in his own name in giving the notice; nor, it seems, if he acted in the name of the principal. Right *v.* Cuthell, 5 East, 491; Doe *dem.* Mann *v.* Walters, 10 B. & Cr. 626; Doe *v.* Goldwin, 2 Q. B. 143.

[6] Thus, it was held that, where an unauthorized agent stopped goods *in transitu*, his act could not be rendered effectual to defeat the consignee's title by the consignor's ratification of the act after the *transitus* was ended. Bird *v.* Brown, 14 Jurist, 132.

possession of the goods; a broker is such agent, but without possession of the goods.[1] Hence, a factor may act for his principal, but in his own name, because the actual owner, by delivering to him the goods, gives to him the appearance of an owner; but a broker must act only in the name of his principal.[2] And a purchaser from a factor may set off a debt due from the factor, unless he buys the goods knowing that they are another's, and perhaps even then; not so, if the purchaser buy from a broker.[3] Again, a factor has a lien on the goods for his claims against his principal;[4] but a broker generally has not.[5] One may be a factor as to all rights and duties, who is called a *broker;* as an exchange-broker, who has notes for sale on discount, certificates of stock, &c., delivered into his possession.[6]

A cashier of a bank, or other official person, may be an agent for those whose officer he is, or for others who employ him. He has, without especial gift, all the authority necessary or usual to the transaction of his business.[7] But he cannot bind his em-

[1] Parsons on Contracts, p. 78.

[2] "The distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name." Per *Abbott,* C. J., in Baring *v.* Corrie, 2 B. & Ald. 137, 143.

[3] Baring *v.* Corrie, 2 B. & Ald. 137, 143; Lime Rock Bank *v.* Plimpton, 17 Pick. 159.

[4] Drinkwater *v.* Goodwin, Cow. 251; Hudson *v.* Granger, 5 B. & Ald. 27; Stevens *v.* Robins, 12 Mass. 180; Williams *v.* Littlefield, 12 Wend. 362; Holbrook *v.* Wight, 24 Wend. 169; Marfield *v.* Douglass, 1 Sandf. 360; Jordan *v.* James, 5 Hammond, (Ohio,) 88. The factor has a general lien to secure all advances and liabilities. Cowell *v.* Simpson, 16 Ves. 275; Stevens *v.* Robins, 12 Mass. 180; Bryce *v.* Brooks, 26 Wend. 367; Knapp *v.* Alvord, 10 Paige, 205. See Winter *v.* Coit, 3 Selden, 288; Dixon *v.* Stansfeld, 10 C. B. 398.

[5] But insurance brokers have a general lien on policies of insurance procured by them, and the amounts collected under them. Castling *v.* Aubert, 2 East, 325; Mann *v.* Shiffner, 2 id. 523; Spring *v.* South Carolina Ins. Co. 8 Wheat. 268, 275; Moody *v.* Webster, 3 Pick. 424; Cranston *v.* Philadelphia Ins. Co. 5 Binney, 538.

[6] 1 Bell's Comm. (5th ed.) p. 483. So, where the broker has made advances or guaranteed the sale. Grove *v.* Dubois, 1 T. R. 112; Atkyns *v.* Amber, 2 Esp. 493; Buckbee *v.* Brown, 21 Wend. 115; White *v.* Chouteau, 10 Barb. 202.

[7] Minor *v.* The Mechanics' Bank of Alexandria, 1 Pet. 70; Frankfort Bank *v.* Johnson, 24 Maine, 490; Lloyd *v.* West Branch Bank, 15 Penn. St. 172. The cashier of a bank has *primâ facie* authority to indorse, on behalf of the bank, the negotiable securities held by it. Wild *v.* The Bank of Passamaquoddy, 3 Mason, 505; Fleckner *v.* The United States Bank, 8 Wheat. 360; Mechanics' Bank *v.* The Bank of Columbia, 5 id. 326; Lafayette Bank *v.* State Bank of Illinois, 4 McLean, 208; Folger *v.* Chase, 18 Pick. 63. The same power belongs to the general agent or treasurer of a corporation or joint-stock company. Perkins *v.* Bradley, 24 Vt. 66. So, an indorsement of a promissory note or bill of exchange by the president of a bank, pursuant to authority

ployers by any unusual or illegal contract made with their customers.[1] Nor would his acts or permissions have any validity if they violate his official duties, and are certainly and obviously beyond his power, even if sanctioned by his directors; as if the cashier of a bank permitted overdrawing or the like. And all parties who deal with such agent in such a transaction, would be affected by their knowledge or notice of his want of authority, whether that knowledge was actual, or constructive only and implied by law. And the general agent of a corporation, clothed with a certain power by the charter or the lawful acts of the corporation, may use that power for an authorized or even a prohibited purpose in his dealings with an innocent third party, and render the corporation liable for his acts.[2]

SECTION III.

EXTENT AND DURATION OF AUTHORITY.

A general authority may continue to bind a principal after its actual revocation, if the agency were known and the revocation be wholly unknown to the party dealing with the agent, without his fault.[3]

An authority to sell implies an authority to sell on credit, if

conferred by the directors, will pass the property in the same. Spear *v.* Ladd, 11 Mass. 94; Northampton Bank *v.* Pepoon, id. 288; Merrick *v.* The Bank of the Metropolis, 8 Gill, 59; Stevens *v.* Hill, 29 Maine, 133.

[1] An agreement by the president and cashier of the Bank of the United States, that the indorser of a promissory note should not be liable on his indorsement, was held not to bind the bank. Bank of United States *v.* Dunn, 6 Pet. 51. Nor has he authority to bind the bank by declarations, beyond the scope of his ordinary duties. Merchants' Bank *v.* Marine Bank, 3 Gill, 96; Bank of Metropolis *v.* Jones, 8 Pet. 12; Salem Bank *v.* Gloucester Bank, 17 Mass. 1. Nor can he accept bills of exchange on behalf of the bank, for the accommodation of the drawers merely; and the holder, with notice of such acceptance, cannot recover against the bank. Farmers' and Mechanics' Bank *v.* The Troy City Bank, 1 Doug. (Mich.) 457.

[2] The general agent of a corporation, clothed with a certain power by its charter, and using that power for an unauthorized or prohibited purpose in dealings with an innocent third party, may render the corporation liable; but if such agent has no such power, he cannot bind the corporation by its exercise. All parties who deal with him are affected with knowledge or notice of his want of authority, whether the same be actual, or constructive and implied by law. Life and Fire Ins. Co. *v.* Mechanics' Fire Ins. Co. 7 Wend. 31; Hood *v.* New York and New Haven R. R. Co. 22 Conn. 502; Goodspeed *v.* East Haddam Bank, 22 Conn. 530; Frankfort Bank *v.* Johnson, 24 Maine, 490; Bank of Kentucky *v.* Schuylkill Bank, 1 Parson's Sel. Cas. 180.

[3] Trueman *v.* Loder, 11 A. & E. 589; Beard *v.* Kirk, 11 N. H. 398; Lightbody *v.* North American Ins. Co. 23 Wend. 18; Morgan *v.* Stell, 5 Binn. 316.

that be usual; otherwise not;[1] and if an agent sells on credit without any authority, or by exceeding his authority, the principal may reclaim his goods from the purchaser,[2] or hold the agent responsible for their price.[3] And the agent is generally responsible if he blends the goods of his principal with his own, in such a manner as to confuse them together, or takes a note payable to himself, unless this be authorized by the usage of the trade.[4] And if the agent (or factor) takes a note payable to himself, and becomes bankrupt, such note belongs to his principal, and not to the agent's assignees.[5] In our view of the law, a power to sell gives a power to warrant, where there is a distinct usage of making such sales with warranty, and the want of authority to warrant is unknown to the purchaser without his fault; and not otherwise.[6] A general authority to sell goods carries with it an

[1] Anonymous, 12 Modern, 514; Scott *v.* Surman, Willes, 406, 407; Houghton *v.* Matthews, 3 Bos. & Pull. 489; M'Kinstry *v.* Pearsall, 3 Johns. 319; Van Alen *v.* Vanderpool, 6 Johns. 69; Delafield *v.* Illinois, 26 Wend. 223; Laussatt *v.* Lippincott, 6 S. & R. 386; Greely *v.* Bartlett, 1 Greenl. 172; Goodenow *v.* Tyler, 7 Mass. 36; Hapgood *v.* Batcheller, 4 Met. 573; Forrestier *v.* Bordman, 1 Story, 43; Gerbier *v.* Emery, 2 Wash. C. C. 413. But an auctioneer cannot sell on credit. 3 Chitty on Com. and Manuf. 218. Nor a broker employed to sell stock. Wiltshire *v.* Sims, 1 Campb. 258. An agent for a State, who is authorized to raise money on a sale of its stocks, cannot, without express authority from the State, sell such stocks on credit. State of Illinois *v.* Delafield, 8 Paige, 527, 2 Hill, 159, 26 Wend. 192. And an authority to sell on credit in the principal's name, does not confer an authority to collect the debts by suit. Soule *v.* Dougherty, 24 Vt. 92. An authority to make a contract involves an authority to rescind it, with the consent of the other party. Anderson *v.* Coonley, 21 Wend. 279; Scott *v.* Wells, 6 W. & S. 357.

[2] Anonymous, 12 Mod. 514; Paley on Agency, by Lloyd, (3d Am. ed.) p. 212. See The State of Illinois *v.* Delafield, 8 Paige, 527, 2 Hill, 159, 26 Wend. 192; Robertson *v.* Ketchum, 11 Barb. 652; Peters *v.* Ballistier, 3 Pick. 495; Parsons *v.* Webb, 8 Greenl. 38.

[3] Walker *v.* Smith, 4 Dall. 389; Barksdale *v.* Brown, 1 Nott & McCord, 517.

[4] The taking of a note by the agent, on a sale of the principal's goods, payable to himself, does not *per se* render the agent responsible to his principal in case of the purchaser's insolvency. If such is the usage of trade, the agent is not personally responsible. Goodenow *v.* Tyler, 7 Mass. 36.

[5] Messier *v.* Amery, 1 Yeates, 540; Scott *v.* Surman, Willes, 400. Where the agent sells goods belonging to several principals, and takes from the vendee a note which includes the purchase-money of the whole, payable to himself, he is not thereby made liable to his principals for the debt. Corlies *v.* Cumming, 6 Cow. 181. But where the agent sells his own goods and those of his principal, and takes in payment of both the promissory note of a third person, payable to himself, he makes himself personally responsible to his principal. Symington *v.* M'Lin, 1 Dev. & Bat. 291; Jackson *v.* Baker, 1 Wash. C. C. 394; Brown *v.* Arrott, 6 Watts & Serg. 402. It is held that, if an agent, at the expiration of the credit given at a sale, takes a note payable on a further day to himself, he makes the debt his own. Hosmer *v.* Beebe, 14 Martin, 368. A factor who sells his principal's goods consigned to him for that purpose, and takes the notes of the vendee, which he afterwards has discounted for his own accommodation, becomes responsible for the amount of the sales in the event of the purchaser's insolvency. Myers *v.* Entriken, 6 Watts & Serg. 44. See Wren *v.* Kirton, 11 Ves. 382.

[6] An agent to sell a horse, may warrant him. Alexander *v.* Gibson, 2 Campb. 555; Helyear *v.* Hawke, 5 Esp. 72, 75; Pickering *v.* Busk, 15 East, 45; Skinner *v.* Gunn, 9 Porter, 305; Bradford *v.* Bush, 10 Ala. 386; Peters *v.* Farnsworth, 15 Vt. 159. The

authority to sell by sample.[1] General authority to transact business, or even to receive and discharge debts, does not enable an agent to accept or indorse bills or notes, so as to charge his principal.[2] Indeed, special authorities to indorse are construed strictly.[3] But this authority may be implied from circumstances or from the usage of the agent recognized and sanctioned by the principal.[4] An agent to receive cash, has no authority to take bills or notes, except bank-notes.[5]

If an agent sells, and makes a material representation which he believes to be true, and the principal knows it to be false and

distinction has been taken that a servant, with authority to sell a horse, and forbidden to warrant him, may bind his master by a warranty; but a stranger, with the same authority and restriction, cannot bind his principal by a warranty. Fenn *v.* Harrison, 3 T. R. 760, per *Ashhurst*, J.; Pickering *v.* Busk, 15 East, 45. In this last case, *Bayley*, J., said: "If the servant of a horse dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." See Seignior and Wolmer's case, Godbolt, 360. So, it has been held, as to other articles of personal property, that the power to sell carries with it the power to warrant their condition and quality. Williamson *v.* Canaday, 3 Iredell, 349; Hunter *v.* Jameson, 6 Iredell, 252; Woodford *v.* McClenahan, 4 Gilm. 85; Nelson *v.* Cowing, 6 Hill, 336. Where an authority to warrant is implied from an authority to sell, it is, in general at least, limited to the present state and quality of the thing sold, and does not extend to the future; as, that goods sold for a distant voyage, shall not deteriorate during that voyage. Upton *v.* Suffolk County Mills, S. J. C. Mass. Nov. T. 1853. In Gibson *v.* Colt, 7 Johns. 390, it was held that a special agent cannot bind his master by an unauthorized warranty. But the decision in this case has been disapproved. See Jeffrey *v.* Bigelow, 13 Wend. 521; Sandford *v.* Handy, 23 Wend. 260; Nelson *v.* Cowing, *supra;* Bryant *v.* Moore, 26 Maine, 84. A warranty by a person merely intrusted to deliver goods, does not bind the owner. Woodin *v.* Burford, 2 Cromp. & Meeson, 391, 4 Tyrwh. 264. The warranty of the agent, to bind the principal, must be made at the time of the sale. Alexander *v.* Gibson, 2 Campb. 555; Helyear *v.* Hawke, 5 Esp. 72.

[1] Andrews *v.* Kneeland, 6 Cow. 354.

[2] Gardner *v.* Baillie, 6 T. R. 591; Kilgour *v.* Finlyson, 1 H. Bl. 155; Hogg *v.* Snaith, 1 Taunt. 347; Murray *v.* The East India Company, 5 B. & Ald. 204, 210, 211; Esdaile *v.* La Nauze, 1 You. & Col. 394; Rossiter *v.* Rossiter, 8 Wend. 494; Paige *v.* Stone, 10 Met. 160. See Valentine *v.* Packer, 5 Penn. St. 333. But see Howard *v.* Baillie, 2 H. Bl. 618; Layet *v.* Gano, 17 Ohio, 466. An authority to get a bill discounted does not give authority to indorse it, so as to bind the owner. Fenn *v.* Harrison, 3 T. R. 757.

[3] A power to accept bills for a party and on his behalf, does not authorize the attorney to accept bills drawn on account of his principal's business as a partner. Attwood *v.* Munnings, 7 B. & C. 278. An authority to draw is not an authority to indorse. Robinson *v.* Yarrow, 7 Taunt. 455. Where A authorized B to sign his name to a note for $250, payable in six months, and B put A's name to a note for that sum, payable in sixty days, it was held that A was not liable. Batty *v.* Carswell, 2 Johns. 48. An authority to indorse notes, it seems, does not include an authority to receive notice of their dishonor. Bank of Mobile *v.* King, 9 Ala. 279.

[4] Thus, where a confidential clerk had been accustomed to draw, and the master had in one instance authorized him to indorse, and on two other occasions had received money obtained by his indorsement, it was held that a jury might infer a general authority to indorse. Prescott *v.* Flinn, 9 Bing. 19.

[5] Sykes *v.* Giles, 5 M. & W. 645.

does not correct it, this is the fraud of the principal and avoids the sale.[1]

If an agency be justly implied from general employment, it may continue so far as to bind the principal after his withdrawal of the authority, if that withdrawal be not made known in such way as is usual or proper, to all who deal with the agent as such.[2]

Revocation, generally, is always in the power and at the will of the principal, and his death operates of itself a revocation.[3] But the death of an agent does not revoke the authority of a sub-agent appointed by the agent under an authority given him by the principal.[4] If the power be coupled with an interest, or given for a valuable consideration; and if the continuance of the power is requisite to make the interest available, then it cannot be revoked at the pleasure of the principal.[5] Marriage of the principal, if a feme sole, revokes a revocable authority given by her.[6]

If an agent to whom commercial paper is given for collection, be in fault towards his principal, the measure of his responsibility

[1] Schneider *v.* Heath, 3 Campb. 505; Cornfoot *v.* Fowke, 6 M. & W. 358; Wilson *v.* Fuller, 3 Q. B. 58, 68, 1009; Fitzsimmons *v.* Joslin, 21 Vt. 129.

[2] Monk *v.* Clayton, cited in 10 Mod. 110; —— *v.* Harrison, 12 Mod. 346; Salte *v.* Field, 5 T. R. 214, per *Buller*, J.; Spencer *v.* Wilson, 4 Munf. 130; Morgan *v.* Stell, 5 Binn. 305; Bowerbank *v.* Morris, Wallace, 126.

[3] Co. Litt. 52, (b); Bac. Abr. Authority, (E); Shipman *v.* Thompson, Willes, 104, note; King *v.* The Corporation of the Bedford Level, 6 East, 356; Wallace *v.* Cook, 5 Esp. 117; Smout *v.* Ilbery, 10 M. & W. 1; Harper *v.* Little, 2 Greenl. 14; Gale *v.* Tappan, 12 N. H. 145; McDonald *v.* Black, 20 Ohio, 185; Gleason *v.* Dodd, 4 Met. 333; Huston *v.* Cantrill, 11 Leigh, 136. And death operates as a revocation even before notice thereof communicated to the agent. Galt *v.* Galloway, 4 Pet. 344; Jenkins *v.* Atkins, 1 Humph. 294. But see Cassiday *v.* M'Kenzie, 4 W. & S. 282. If two give a warrant of attorney to confess judgment against them, and one dies, judgment cannot be entered against the other. Raw *v.* Alderson, 7 Taunt. 453; Hunt *v.* Chamberlin, 3 Halst. 336. A power of attorney by deed may be terminated by a parol revocation. Brookshire *v.* Brookshire, 8 Iredell, 74. But if the power be left in the agent's hands, he may bind the principal by his dealings with third parties, on faith of it, who are ignorant of the revocation. Beard *v.* Kirk, 11 N. H. 397.

[4] Smith *v.* White, 5 Dana, 383.

[5] "Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable." Per *Wilde*, C. J., in Smart *v.* Sandars, 5 C. B. 917. So, Lord *Kenyon* held that a power of attorney given as part of a security for money, was not revocable. Walsh *v.* Whitcomb, 2 Esp. 565. And where A, being indebted to B, in order to discharge the debt, executed to B a power of attorney authorizing him to sell certain lands belonging to A, this was held to be an authority coupled with an interest, and not revocable. Gaussen *v.* Morton, 10 B. & C. 731. See further, 1 Parsons on Cont. p. 58, n. (h), and p. 61, n. (m.)

[6] 2 Kent's Com. 645; Anonymous, W. Jones, 388; Charnley *v.* Winstanley, 5 East, 266.

is the damage actually sustained by his principal.[1] He must give notice of the dishonor of such paper to his principal, who must notify the indorsers; and the agent need not notify the indorsers.[2]

If a bank receive notes or bills for collection, although charging no commission, the possible use of the money is consideration enough to make them liable as agents for compensation; that is, liable for any want of due and legal diligence and care.[3] But, by the prevailing, though certainly not uniform authority, if the bank exercise proper skill and care in the choice of a collecting agent, or of a notary or other person or officer, to do what may be necessary in relation to the paper committed to them, the bank is not liable for his want of care or skill.[4]

In general, an exigency or even necessity which would make an extension of the power of an agent very useful to his employer, will not give that extension. A master of a ship, however, may sell it, in case of necessity, or pledge it by bottomry, to raise money. But this is a peculiar effect of the law-merchant, and no such general rule applies to ordinary agencies.[5]

[1] Allen *v.* Suydam, 20 Wend. 321; Hoard *v.* Garner, 3 Sandf. 179; Arrott *v.* Brown, 6 Whart. 9. See Harvey *v.* Turner, 4 Rawle, 223.

[2] Mead *v.* Engs, 5 Cow. 303; Howard *v.* Ives, 1 Hill, 263; Bank of the United States *v.* Davis, 2 id. 451; Colt *v.* Noble, 5 Mass. 167; Church *v.* Barlow, 9 Pick. 547; Lawson *v.* The Farmers' Bank of Salem, 1 Ohio St. 221.

[3] Smedes *v.* Utica Bank, 20 Johns. 372, 3 Cow. 663; McKinster *v.* The Bank of Utica, 9 Wend. 46, 11 id. 473; Mechanics' Bank *v.* Merchants' Bank, 6 Met. 13; Wingate *v.* Mechanics' Bank, 10 Penn. St. 104.

[4] Bellemire *v.* Bank of United States, 4 Whart. 105. A bank, receiving bills and notes for collection payable at another place, and transmitting the same according to usage, to a suitable bank or other agent at the place of payment for that purpose, is not responsible to the owner thereof for the default of such bank or agent. Jackson *v.* Union Bank, 6 Harris. & Johns. 146; East Haddam Bank *v.* Scovil, 12 Conn. 303; Wingate *v.* Mechanics' Bank, 10 Penn. St. 104; Fabens *v.* Mercantile Bank, 23 Pick. 330; Dorchester and Milton Bank *v.* New England Bank, 1 Cush. 177; Warren Bank *v.* Suffolk Bank, S. J. C. Mass. Suffolk, March T. 1853. So, it was held by the Supreme Court of New York, in Allen *v.* Merchants' Bank, 15 Wend. 482, which decision was reversed by the Court of Errors by a vote of 14 to 10, Chancellor *Walworth* delivering an opinion in favor of affirming the judgment of the Supreme Court. 22 Wend. 215. This decision of the Court of Errors is regarded as having settled the law for New York. See Hoard *v.* Garner, 3 Sandf. 179; The Montgomery County Bank *v.* The Albany City Bank, 8 Barb. 396, 3 Selden, 459.

[5] Thus, where no authority is given to an agent to borrow money, he cannot borrow in case of an emergency. Hawtayne *v.* Bourne, 7 M. & W. 595; Chapman *v.* Morton, 11 id. 534. Masters of vessels are justified in departing from precise instructions, if an unforeseen emergency arises, and they act in good faith and for the obvious and certain advantage of their principal. Judson *v.* Sturges, 5 Day, 556; Drummond *v.* Wood, 2 Caines, 310; Liotard *v.* Graves, 3 Caines, 226; Lawler *v.* Keaquick, 1 Johns. Cas. 174; Stainbank *v.* Shepard, 20 Eng. Law and Eq. 547; Forrestier *v.* Bordman, 1 Story, 34; Gould *v.* Rich, 7 Met. 556. See *post*, the chapter on the law of shipping.

SECTION IV.

OF THE EXECUTION OF AUTHORITY.

Generally, an authority must be conformed to with great strictness and accuracy; otherwise, the principal will not be bound, although the agent may be bound personally.[1] Thus, if A, the agent of B, signs "A for B," it has been said that this is not the act of B, but of A for him. But if he signs "B by A," this is the act of B by his instrument A. This strictness is now abated considerably; and, whatever be the form or manner of the signature of a simple contract, it will be held to bind the principal, if that were the certain and obvious intent.[2] In the case of sealed instruments, it would seem that the ancient severity is more strictly maintained.[3] That the authority must be conformed to with strict accuracy, in all matters of substance, is quite certain; but the whole instrument will be considered, in order to ascertain the intention of the parties and the extent of

[1] Nixon *v.* Hyserott, 5 Johns. 58; North River Bank *v.* Aymar, 3 Hill, 262. Thus, where A authorized B to sign his name to a note for $250 payable in six months, and B put A's name to a note for that sum payable in sixty days, it was held that A was not liable. Batty *v.* Carswell, 2 Johns. 48. And see Andrews *v.* Kneeland, 6 Cow. 357; Moody *v.* Threlkeld, 13 Geo. 55; Gordon *v.* Buchanan, 5 Yerg. 71. Where the agent completely executes his authority and goes beyond it, and the excess can be rejected, it seems that his principal will be bound to the extent of the authority conferred. Co. Litt. 258, (a); Alexander *v.* Alexander, 2 Ves. Sen. 644; 1 Livermore on Agency, pp. 98–101. So, where the nature of the agency authorizes the agent to attempt its execution in part, and having done this, he is unable to complete it, the principal will be bound. Gordon *v.* Buchanan, 5 Yerg. 81; Johnson *v.* Blasdale, 1 Sm. & Marsh. 1; 1 Livermore on Agency, 99.

[2] See Mechanics' Bank *v.* The Bank of Columbia, 5 Wheat. 326, 337; Long *v.* Colburn, 11 Mass. 97; Wilks *v.* Back, 2 East, 142; Beckham *v.* Drake, 9 M. & W. 79. It is now well settled that a deed purporting to be the deed of A, and executed "B for A," is well executed as the deed of A, if B was duly authorized to execute it. Wilks *v.* Back, 2 East, 142; Hunter *v.* Miller, 6 B. Mon. 612; Wilburn *v.* Larkin, 3 Blackf. 55; Mussey *v.* Scott, 7 Cush. 215; Hale *v.* Woods, 10 N. H. 470.

[3] Bac. Abr. Leases, (I, 10.) Clarke *v.* Courtney, 5 Pet. 319, 350; Bogart *v.* De Bussy, 6 Johns. 94; Townsend *v.* Corning, 23 Wend. 435; Elwell *v.* Shaw, 16 Mass. 42; Brinley *v.* Mann, 2 Cush. 337; Abbey *v.* Chase, 6 id. 54. The opinion was intimated in Wood *v.* Goodridge, 6 Cush. 117, that the signing by an attorney of the name of his principal to an instrument, which contains nothing to indicate that it is executed by attorney, and without adding his own signature as such, is not a valid execution. But it was held, in Morse *v.* Green, 13 N. H. 32, that, where a party has authorized another to subscribe his name to a note, the fact that his signature was placed there by an agent, need not appear on the note.

authority.[1] A power given to two cannot be executed by one;[2] but some exception to the rule as to joint power exists in the case of public agencies,[3] and also in many commercial transactions. Thus, either of two factors — whether partners or not — may sell goods consigned to both.[4] And where there are joint agents, whether partners or not, notice to one is notice to both.[5] In commercial matters, usage, or the reason of the thing, may sometimes seem to add to an authority; so far at least as is requisite for the full discharge of the duty committed to the agent in the best and most complete manner.[6] Thus, it is held that an agent, to get a bill discounted, may indorse it in the name of his principal;[7] and a broker, employed to procure insurance, may adjust a loss under the same; but he cannot give up any advantages, rights, or securities of the assured, by compromise or otherwise, without special authority.[8]

[1] Long *v.* Coburn, 11 Mass. 97; Rice *v.* Gove, 22 Pick. 158; Townsend *v.* Corning, 23 Wend. 435; Townsend *v.* Hubbard, 4 Hill, 357; Pinckney *v.* Hagadorn, 1 Duer, 96. And where the agency appears from a contract made by the agent for a domestic principal, the presumption is that the agent meant to bind his principal only. Kirkpatrick *v.* Stainer, 22 Wend. 255; Dyer *v.* Burnham, 25 Maine, 13; Alexander *v.* Bank of Rutland, 24 Vt. 222.

[2] Andover *v.* Grafton, 7 N. H. 304; Dispatch Line of Packets *v.* Bellamy Manuf. Co. 12 id. 226; Kupfer *v.* South Parish in Augusta, 12 Mass. 185; Damon *v.* Granby, 2 Pick. 354; Copeland *v.* Mercantile Ins. Co. 6 id. 202; First Parish in Sutton *v.* Cole, 3 id. 244; Low *v.* Perkins, 10 Vt. 532; Green *v.* Miller, 6 Johns. 39. But it is otherwise where an intention appears in the instrument creating the authority to authorize the agents to act separately. Guthrie *v.* Armstrong, 5 B. & Ald. 628.

[3] Co. Litt. 181, b.; Com. Dig. Attorney, (C); Bac. Abr. Authority, (C); King *v.* Beeston, 3 T. R. 592; Grindley *v.* Barker, 1 B. & P. 229; The King *v.* Whitaker, 9 B. & C. 648.

[4] Godfrey *v.* Saunders, 3 Wils. 114.

[5] Bank of the United States *v.* Davis, 2 Hill, 463, 464.

[6] Parsons on Contracts, p. 52; Sutton *v.* Tatham, 10 Ad. & El. 27; Le Roy *v.* Beard, 8 How. 467. The application of this doctrine to cases where the authority is in writing, is at least doubtful. Attwood *v.* Munnings, 7 B. & C. 278; Johnston *v.* Usborne, 11 A. & E. 557; Delafield *v.* Illinois, 26 Wend. 192; Schimmelpennich *v.* Bayard, 1 Pet. 264. Usage may likewise limit a general authority. Dickinson *v.* Lilwall, 4 Campb. 279.

[7] Fenn *v.* Harrison, 4 T. R. 177. See Nickson *v.* Birhan, 10 Mod. 109. Unless the agent be expressly forbidden to indorse the bill. Fenn *v.* Harrison, 3 T. R. 757.

[8] Richardson *v.* Anderson, 1 Campb. 43, n. Therefore, a settlement made by a set-off of the premiums due from the broker to the underwriter, on general account against the sum due on the policy from the underwriter, will not bind the assured, unless assented to by him. Todd *v.* Reid, 4 B. & Ald. 210; Russell *v.* Bangley, id. 395; Bartlett *v.* Pentland, 10 B. & C. 760; Scott *v.* Irving, 1 B. & Ad. 605.

SECTION V.

LIABILITY OF AN AGENT.

Generally, an agent makes himself liable by his express agreement,[1] or by transcending his authority, or by a material departure from it,[2] or by concealing his character as agent,[3] or by such conduct as renders his principal irresponsible,[4] or by his own bad faith. If he exceeds his authority, he is liable on the whole contract, although a part of it is within his authority.[5] One who, having no authority, acts as agent, is personally responsible.[6] But if an agent transcends his authority through an ignorance of its limits, which is actual and honest, and is not imputable to his own neglect of the means of knowledge, it may be doubted whether he would be held. But we think he would, if an innocent party dealing with him as agent, would otherwise suffer loss.[7] But he should be sued in an action on the case for

[1] If an agent, executing a written contract, use language the legal effect of which is to charge himself personally, it is not competent for him to exonerate himself by showing that he acted for a principal, and that the other contracting party knew this fact at the time when the agreement was made and signed. Jones *v.* Littledale, 6 Ad. & El. 486; Magee *v.* Atkinson, 2 M. & W. 440; Higgins *v.* Senior, 8 id. 834. *A fortiori*, where the contract is under seal. Appleton *v.* Binks, 5 East, 148; Duvall *v.* Craig, 2 Wheat. 56; Tippets *v.* Walker, 4 Mass. 595; Forster *v.* Fuller, 6 id. 58; White *v.* Skinner, 13 Johns. 307; Stone *v.* Wood, 7 Cow. 453; Fash *v.* Ross, 2 Hill, (S. Car.) 294.

[2] Feeter *v.* Heath, 11 Wend. 477; White *v.* Skinner, 13 Johns. 307; Johnson *v.* Ogilby, 3 P. W. 279; Pitman *v.* Kintner, 5 Blackf. 250. As where he sells for credit, contrary to the instructions of his principal. Walker *v.* Smith, 4 Dallas, 389. But this departure from authority, in order to charge the agent, must be unknown to the other contracting party. Jones *v.* Downman, 4 Q. B. 235, n. (a.)

[3] Franklyn *v.* Lamond, 4 C. B. 637; Evans *v.* Evans, 3 Ad. & El. 132.

[4] Fenu *v.* Harrison, 3 T. R. 761, per *Ashurst*, J.; Savage *v.* Rix, 9 N. H. 263.

[5] Fleeter *v.* Heath, 11 Wend. 485. It was held, in Johnson *v.* Blasdale, 1 S. & M. 1, that, if an agent, in filling up a blank note, exceed his authority, and the third party receive the note with knowledge that the authority has been transcended, the note will not be void *in toto*, but only for the excess beyond the sum authorized.

[6] East India Co. *v.* Hensley, 1 Esp. 112; Johnson *v.* Ogilby, 3 P. W. 278, 279; Bowen *v.* Morris, 2 Taunt, 385, 386; Jones *v.* Downman, 4 Q. B. 235; Thomas *v.* Hewes, 2 C. & Mee. 530, note (a); Dusenbury *v.* Ellis, 3 Johns. Cas. 70; Meech *v.* Smith, 7 Wend. 315; Woodes *v.* Dennett, 9 N. H. 55; Palmer *v.* Stephens, 1 Denio, 471.

[7] Smout *v.* Ilbery, 10 M. & W. 9. See a contrary dictum of Lord *Tenterden*, in Polhill *v.* Walter, 3 B. & Ad. 124, where it was said that, if the agent "acted upon a power of attorney which he supposed to be genuine, but which was in fact a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false." According to a recent case in England, the agent is not liable to the party dealing with him, where there has been no fraud or concealment on his part,

falsely assuming authority to act as agent, and not on the contract, unless it contains apt words to charge him personally.[1]

SECTION VI.

RIGHTS OF ACTION GROWING OUT OF AGENCY.

If an agent intrusted with goods, sell the same without authority, the principal may affirm the sale and sue the buyer for the price, or he may disaffirm the sale and recover the goods from the vendee.[2]

In case of a simple contract, an undisclosed principal may show that the nominal party was actually his agent, and thus make himself actually a party to the contract, and sue upon it.[3] But he cannot do this to the detriment of the other party.[4] So, too, an undisclosed principal, when discovered, may be made liable on such contract;[5] but would be protected if his accounts

and the circumstances which revoked his authority before the business was transacted, were equally within the knowledge of both contracting parties. Thus, where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family, and died abroad, it was held that the wife was not liable for meat supplied to her after his death, and before information thereof had been received. Smout *v.* Ilbery, *supra.*

[1] Long *v.* Colburn, 11 Mass. 97; Ballou *v.* Talbot, 16 id. 461; Jefts *v.* York, 4 Cush. 371; Abbey *v.* Chase, 6 id. 54; Harper *v.* Little, 2 Greenl. 14; Stetson *v.* Patten, id. 358; Hopkins *v.* Mehaffy, 11 S. & R. 126; Jenkins *v.* Hutchinson, 13 Q. B. 744. See 2 Cro. & Mee. 530, note; Wilson *v.* Barthrop, 2 M. & W. 863; Jones *v.* Downman, 4 Q. B. 235, note; Woodes *v.* Dennett, 9 N. H. 55; Savage *v.* Rix, 9 id. 263; Moor *v.* Wilson, 6 Fost. 332. But in New York, the agent is held liable on the contract in such cases, whatever may be the language used. Dusenbury *v.* Ellis, 3 Johns. Cas. 70; White *v.* Skinner, 13 Johns. 307; Randall *v.* Van Vechten, 19 id. 60; Meech *v.* Smith, 7 Wend. 315; Palmer *v.* Stephens, 1 Denio, 471.

[2] See *ante*, p. 141, nn. 2 and 3.

[3] The Duke of Norfolk *v.* Worthy, 1 Campb. 337; Sadler *v.* Leigh, 4 id. 195; Coppin *v.* Walker, 7 Taunt. 237; Wilson *v.* Hart, id. 295; Higgins *v.* Senior, 8 M. & W. 844; Whitmore *v.* Gilmour, 12 id. 808; Taintor *v.* Prendergast, 3 Hill, 72; Edwards *v.* Golding, 20 Vt. 30; Commercial Bank *v.* French, 21 Pick. 486; Huntington *v.* Knox, 7 Cush. 371; Girard *v.* Taggart, 5 S. & R. 27. The same rule applies where the agent is a partner or joint party, acting for his copartners or the other joint parties. Skinner *v.* Stocks, 4 B. & Ald. 437; Garrett *v.* Handley, 4 B. & C. 664; Cothay *v.* Fennell, 10 id. 671. But if the agent describes himself as owner in the written contract, the principal cannot sue. Humble *v.* Hunter, 12 Q. B. 310.

[4] George *v.* Clagett, 7 T. R. 359; Stracey *v.* Deey, 7 id. 361, note; Baring *v.* Corrie, 2 B. & Ald. 137; Carr *v.* Hinchliff, 4 B. & C. 547; Sims *v.* Bond, 5 B. & Ad. 389; Warner *v.* M'Kay, 1 M. & W. 591; Kelley *v.* Munson, 7 Mass. 324; Lime Rock Bank *v.* Plimpton, 17 Pick. 159; Violett *v.* Powell, 10 B. Monr. 347; Gardner *v.* Allen, 6 Ala. 187; Wait *v.* Johnson, 24 Vt. 112.

[5] Moore *v.* Clementson, 2 Campb. 22; Thomas *v.* Edwards, 2 M. & W. 215; Jones *v.* Littledale, 6 A. & E. 486; Nelson *v.* Powell, 3 Doug. 410; Trueman *v.* Loder, 11 A. & E. 589; Beebee *v.* Robert, 12 Wend. 413; Taintor *v.* Prendergast, 3 Hill, 72;

or relations with his agent had been in the mean time changed in good faith, so as to make it detrimental to him to be held liable.[1] If one sells to an agent, knowing him to be an agent, and knowing who is his principal, and elects to charge the goods to the agent alone, he cannot afterwards transfer the charge to the principal.[2]

In any transaction done through an agent, the knowledge of the principal is said to be the knowledge of the agent;[3] we should doubt whether it were so always, at the instant of the principal's acquiring it; but it certainly is when the principal has had the means of communicating the knowledge to the agent.[4] Notice to an agent before the transaction goes so far as to render the notice useless, is notice to the principal.[5] And knowledge obtained by an agent in the course of the transaction itself, is knowledge of the principal.[6] Notice to an officer or member of

Upton *v.* Gray, 2 Greenl. 373; Hyde *v.* Wolf, 4 Louis. 234; Conro *v.* Port Henry Iron Co. 12 Barb. 27; Clealand *v.* Walker, 11 Ala. 1064; Perth Amboy Manuf. Co. *v.* Condit, 1 Zabriskie, (N. J.) 659. And the same rule holds where the party dealing with the agent knows him to be acting as agent; but, not knowing who his principal is, credits the agent. Thomson *v.* Davenport, 9 B. & C. 78; Raymond *v.* Crown and Eagle Mills, 2 Met. 319; Baxter *v.* Duren, 29 Maine, 434. According to the English authorities, the liability of the unnamed principal in such cases is not affected by the Statute of Frauds. Higgins *v.* Senior, 8 M. & W. 844; Trueman *v.* Loder, 11 A. & E. 589; Beckham *v.* Drake, 9 M. & W. 79, 11 id. 315. But this has been denied in this country. Fenly *v.* Stewart, 5 Sandf. 101. And see 1 Parsons on Cont. 48, n. (a.)

[1] Thompson *v.* Davenport, 9 B. & C. 78; Kymer *v.* Suwercropp, 1 Campb. 109; Carr *v.* Hinchliff, 4 B. & C. 551; Horsfall *v.* Fauntleroy, 10 B. & C. 755; Taylor *v.* Kymer, 3 B. & Ad. 334; Sims *v.* Bond, 5 B. & Ad. 393; Smyth *v.* Anderson, 7 C. B. 21.

[2] Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandassequi, 4 Taunt. 574; Thomson *v.* Davenport, 9 B. & C. 78; Patapsco Ins. Co. *v.* Smith, 6 H. & J. 171; French *v.* Price, 24 Pick. 13; Green *v.* Tanner, 8 Met. 411; Paige *v.* Stone, 10 id. 169; Hyde *v.* Paige, 9 Barb. 150; Clealand *v.* Walker, 11 Ala. 1058.

[3] Mayhew *v.* Eames, 3 B. & C. 601; Powles *v.* Page, 3 C. B. 16.

[4] In Willis *v.* Bank of England, 4 Ad. & El. 21, 39, the doctrine of notice was thus stated by Lord *Denman:* "The general rule of law is, that notice to the principal is notice to all his agents; at any rate, if there be reasonable time, as there was here, for the principal to communicate that notice to his agents, before the event which raises the question happens. . . . We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere whatever notices they may receive, but the argument *ab inconvenienti* is seldom entitled to much weight in deciding with legal questions; and if it were, other inconveniences of a more serious nature would obviously grow out of a different decision."

[5] Astor *v.* Wells, 4 Wheat. 466; Hovey *v.* Blanchard, 13 N. H. 145. As to the time when notice may be given, see Tourville *v.* Naish, 3 P. Wms. 307; Wigg *v.* Wigg, 1 Atk. 384; Story *v.* Lord Windsor, 2 Atk. 630; More *v.* Mayhow, 1 Ch. Cas. 34; Bracken *v.* Miller, 4 W. & S. 102. Where a notice is required, and nothing is said as to the manner of notification, in general it may be by parol. McEwen *v.* The Montgomery County Ins. Co. 5 Hill, 101. If one assume to act as agent of another, the party adopting the act must take it charged with notice of such matters as appear to have been at the time of the act within the knowledge of the agent. Hovey *v.* Blanchard, *supra.*

[6] Fitzherbert *v.* Mather, 1 T. R. 12; Cowen *v.* Simpson, 1 Esp. 290; Berkeley *v.* Watling, 7 Ad. & El. 29; Sutton *v.* Dillaye, 3 Barb. 529. So the principal is charge-

a corporation, is notice to that corporation, if the officer or member, by appointment, or by usage, had authority to receive it for the corporation;[1] but notice to any member is not necessarily notice to a corporation.[2]

If money be paid to one as agent of a principal who has color of right, the party paying cannot try that right in an action against the agent for money had and received, but must sue the principal.[3] But where the principal has no right, the action may be brought against the agent, unless he has in good faith paid the money over to his principal, or made himself personally liable to him for it.[4] And if he received the money illegally, he may be sued, although he has paid it over;[5] or if he has paid it over when he should not have done so; as if he pays it before a certain condition, precedent to the payment, be performed.[6]

able with notice to a duly authorized sub-agent. Boyd *v.* Vanderkemp, 1 Barb. Ch. 273. But notice to the agent, in order to affect the principal, must be obtained in the course of the same transaction. Thus, it is held that knowledge obtained by an attorney in another transaction, does not bind his client. Mountford *v.* Scott, 3 Madd. 34; Worsley *v.* Scarborough, 3 Atk. 392; Hiern *v.* Mill, 13 Ves. 120; Hood *v.* Fahnestock, 8 Watts, 489; Bracken *v.* Miller, 4 W. & S. 102. But see Hargreaves *v.* Rothwell, 1 Keen, 154; Champlin *v.* Layton, 6 Paige, 189; Griffith *v.* Griffith, 9 id. 315, 1 Hoff. Ch. 153. Where vendor and purchaser employ the same solicitor, the purchaser is affected with notice of whatever that solicitor had notice of in that transaction, in his capacity of solicitor for either vendor or purchaser. Toulmin *v.* Steere, 3 Meriv. 210; Fuller *v.* Benett, 2 Hare, 394; Dryden *v.* Frost, 3 Mylne & Cr. 670.

[1] Taff Vale Railway Co. *v.* Giles, 22 Eng. Law and Eq. 202; Bank of United States *v.* Davis, 2 Hill, 451; North River Bank *v.* Aymar, 3 id. 274; Conro *v.* Port Henry Iron Co. 12 Barb. 27; The New-Hope and Delaware Bridge Co. *v.* The Phœnix Bank, 3 Comst. 156; Porter *v.* Bank of Rutland, 19 Vt. 410. It has been held that notice to a director of a bank is not notice to the bank. Louisiana State Bank *v.* Senecal, 13 Louis. 525; Commercial Bank *v.* Cunningham, 24 Pick. 276; Custer *v.* Tompkins County Bank, 9 Penn. St. 27. But if a director who has received notice, communicates the same to the board of directors at a regular meeting, the bank is, of course, bound. Bank of Pittsburgh *v.* Whitehead, 10 Watts, 397. And notice to the president or cashier of a bank, of matters relating to the ordinary business of the institution, is notice to the bank. New Hope and Delaware Bridge Co. *v.* The Phœnix Bank, 3 Comst. 156; Conant *v.* The Seneca County Bank, 1 Ohio St. R. 298; Bank of St. Marys *v.* Mumford, 6 Geo. 44.

[2] Housatonic and Lee Banks *v.* Martin, 1 Met. 308; Bank of Pittsburgh *v.* Whitehead, 10 Watts, 397; Union Canal Co. *v.* Loyd, 4 W. & S. 393. And see Fulton Bank *v.* New York and Sharon Canal Co. 4 Paige, 136; National Bank *v.* Norton, 1 Hill, 578; Powles *v.* Page, 3 C. B. 16.

[3] Pond *v.* Underwood, 2 Ld. Raym. 1210; Sadler *v.* Evans, 4 Burr. 1984; Horsfall *v.* Handly, 8 Taunt. 136; Alexander *v.* Southey, 5 B. & Ald. 247; Bamford *v.* Shuttleworth, 11 Ad. & El. 926; Stephens *v.* Badcock, 3 B. & Ad. 354; Costigan *v.* Newland, 12 Barb. 456; Colvin *v.* Holbrook, 2 Comst. 126. But, to protect the agent, the money should be paid to him voluntarily and for the principal's use. Snowdon *v.* Davis, 1 Taunt. 359; Ripley *v.* Gelston, 9 Johns. 209.

[4] Buller *v.* Harrison, Cowp. 565; Wilson *v.* Anderton, 1 B. & Ad. 450; Cox *v.* Prentice, 3 M. & S. 344; Hearsey *v.* Pruyn, 7 Johns. 182; McDonald *v.* Napier, 14 Geo. 89.

[5] Townson *v.* Wilson, 1 Campb. 396; Smith *v.* Sleap, 12 M. & W. 585.

[6] Hardman *v.* Willcork, 9 Bing. 382, note. So, if the agent has received notice not

For an injury sustained from a third party through the default of an agent, a principal may, generally, bring an action against that third party in his own name; and then may have the evidence of the agent. If an agent and a third person have used the principal's money illegally, as in the purchase of lottery tickets, though the agent could bring no action, the principal may, if personally innocent. And where an agent has been induced, by the fraud of a third person, to pay money which ought not to have been paid, either the agent or the principal may bring an action to recover the money back.[1]

An agent in possession of negotiable paper may be treated with as having full authority to dispose of the same, by any person not having knowledge of the absence or limitation of authority.[2] But if they are given only in payment of or as security for a preëxisting debt, there is, perhaps, reason for saying that the receiver takes only the right and interest of the party from whom he receives them. Such, at least, has been the decision in some cases; on the ground that this was not a proper business use of negotiable paper. But we are not entirely satisfied either with the reason, or the conclusion.[3]

to pay over, then he may be sued. Sadler *v.* Evans, 4 Burr. 1984; Hardacre *v.* Stewart, 5 Esp. 103; Hearsey *v.* Pruyn, 7 Johns. 179; Elliott *v.* Swartwout, 10 Pet. 136; Bend *v.* Hoyt, 13 id. 263; Cary *v.* Curtis, 3 How. 236. And knowledge that such payment would be wrongful, is equivalent to express notice. Edwards *v.* Hodding, 5 Taunt. 815. It is held in New York that, where an agent rightfully receives money for his principal, which ought to be paid over by the principal to a third person, such third person cannot maintain an action against the agent to recover it, though the agent has never in fact paid it over to his principal, and though the agent had notice of the claim of such third person. Costigan *v.* Newland, 12 Barb. 456; Colvin *v.* Holbrook, 2 Comst. 126; McDonald *v.* Napier, 14 Geo. 89.

[1] Stevenson *v.* Mortimer, Cowp. 806; Holt *v.* Ely, 18 Eng. Law and Eq. 422, 1 Ell. & Black. 795.

[2] Collins *v.* Martin, 1 B. & P. 648; Bolton *v.* Puller, 1 id. 539; Jarvis *v.* Rogers, 13 Mass. 105; Bay *v.* Coddington, 5 Johns. Ch. 54, 20 Johns. 637. But if a person, receiving such paper from the agent, has notice of the extent and limitation of his authority, he is bound by it. Goodman *v.* Harvey, 4 Ad. & El. 870; Uther *v.* Rich, 10 id. 784; Stephens *v.* Foster, 1 Cromp., Mees. & Ros. 849; Arbouin *v.* Anderson, 1 Q. B. 498. So, if the indorsement is restrictive; for this is constructive notice. Treuttel *v.* Barandon, 8 Taunt. 100; Sigourney *v.* Lloyd, 8 B. & C. 622, 5 Bing. 525; Brown *v.* Jackson, 1 Wash. C. C. 515.

[3] Bay *v.* Coddington, 5 Johns. Ch. 54, 20 Johns. 637; Payne *v.* Cutler, 13 Wend. 605; Stalker *v.* M'Donald, 6 Hill, 93. And see, *contrà*, Swift *v.* Tyson, 16 Pet. 15; Chicopee Bank *v.* Chapin, 8 Met. 40; Stevens *v.* Blanchard, 3 Cush. 169; Bramhall *v.* Beckett, 31 Maine, 205.

SECTION VII.

HOW A PRINCIPAL IS AFFECTED BY THE ACTS OF HIS AGENT.

If an agent make a fraudulent representation, a principal may be liable for resulting injury, although personally ignorant and innocent of the wrong;[1] nor can he take any benefit therefrom.[2] And even if, without actual fraud, he makes a false representation as to a matter peculiarly within the knowledge of himself or his principal, the principal cannot claim or hold any advantage therefrom; but the party dealing with the agent may rescind and annul the transaction, if he do so as soon as he has knowledge of the untruth; and may then recover back money paid or goods sold or delivered.[3] But such representations will not affect the principal unless they are made during and in the very course of that transaction.[4]

Payment to an agent binds the principal only if made to him in the course of business, and appropriated by the payer to that specific purpose, and the agent has authority to receive the money, either by express appointment, by usage, or by the reason of the case.[5] Payment to a sub-agent appointed by the agent,

[1] Hern *v.* Nichols, 1 Salk. 289; Fitzherbert *v.* Mather, 1 T. R. 12; Doe *v.* Martin, 4 id. 66; Taylor *v.* Green, 8 C. & P. 316; Irving *v.* Motly, 7 Bing. 543; Attorney-General *v.* Ansted, 12 M. & W. 520; Locke *v.* Stearns, 1 Met. 560; Southwick *v.* Estes, 7 Cush. 385; Concord Bank *v.* Gregg, 14 N. H. 331. And he is so liable for the fraud of his agent, acting in violation of positive instruction, provided he keeps within the course of his usual employment. Johnson *v.* Barber, 5 Gilman, 425; Lobdell *v.* Baker, 1 Met. 193; Concord Bank *v.* Gregg, 14 N. H. 331. And see Peto *v.* Hague, 5 Esp. 135; Huckman *v.* Fernie, 3 M. & W. 505; Woodin *v.* Burford, 2 Cr. & Mees. 392; Sherwood *v.* Marwick, 5 Greenl. 302; United States *v.* Williams, Ware, 175. *Aliter*, if he goes beyond the scope of his business, or if he is known, by the party dealing with him, to be violating his instructions. Cases *supra*.

[2] Seaman *v.* Fonereau, 2 Stra. 1183; Taylor *v.* Green, 8 C. & P. 316; Jeffrey *v.* Bigelow, 13 Wend. 518; Olmsted *v.* Hotailing, 1 Hill, 317; Fitzsimmons *v.* Joslin, 21 Vt. 129; Veazie *v.* Williams, 3 Story, 611, 8 How. 134; Mason *v.* Crosby, 1 Wood. & Minot, 342; Foster *v.* Swasey, 2 Wood. & Minot, 217.

[3] Willes *v.* Glover, 4 B. & P. 14; Fitzherbert *v.* Mather, 1 T. R. 16; Carpenter *v.* Am. Ins. Co. 1 Story, 57. And, it seems, the purchaser, without rescinding the contract, may maintain case for deceit against the principal. Fuller *v.* Wilson, 3 Q. B. 58.

[4] Peto *v.* Hague, 5 Esp. 134; Dawson *v.* Atty, 7 East, 367; Snowball *v.* Goodricke, 4 B. & Ad. 543; Fairlie *v.* Hastings, 10 Ves. 123; Thallhimer *v.* Brinckerhoff, 4 Wend. 394; Hubbard *v.* Elmer, 7 Wend. 446; Sandford *v.* Handy, 23 id. 260; Bank of the United States *v.* Davis, 2 Hill, 464; Nelson *v.* Cowing, 6 Hill, 336; Hannay *v.* Stewart, 6 Watts, 487; Hough *v.* Richardson, 3 Story, 689.

[5] Thomson *v.* Thomson, 7 Ves. 470; Drinkwater *v.* Goodwin, Cowp. 256; Moore *v.* Clementson, 2 Camp. 22; Capel *v.* Thornton, 3 C. & P. 352; Morris *v.* Cleasby, 1 M. & S. 566; Hodnett *v.* Tatum, 9 Geo. 70.

but whose appointment is not authorized by the principal, binds the agent, and renders him liable to the principal for any loss of the money in the sub-agent's hands.[1] A legacy to a tradesman, paid to a shopman who was in the habit of receiving daily payments, was held not a sufficient payment to discharge the executor.[2] Nor is the principal bound, if the agent be authorized to receive the money, but, instead of actually receiving it, discharge a debt due from him to the payer, and then give a receipt as for money paid to his principal,[3] unless it can be shown that he has special authority to receive payment in this way, or that such payment is justified by known usage.[4]

[1] Taber *v.* Perrot, 2 Gall. 565.

[2] Sanderson *v.* Bell, 2 Cr. & Mees. 313. See Monk *v.* Whittenbury, 2 M. & Rob. 81. "If a shopman who is authorized to receive payment over the counter only, receives money elsewhere than in the shop, that payment is not good. The principal might be willing to trust the agent to receive money in the regular course of business in the shop, when the latter was under his own eye, or under the eyes of those in whom he had confidence, but he might not wish to trust the agent with the receipt of money elsewhere." Per *Parke*, B., in Kaye *v.* Brett, 5 Exch. 274.

[3] Todd *v.* Reid, 4 B. & Ald. 210; Russell *v.* Bangley, 4 id. 395; Bartlett *v.* Pertland, 10 B. & C. 760; Scott *v.* Irving, 1 B. & Ad. 605; Kingston *v.* Kincaid, 1 Wash. C. C. 454; Sangston *v.* Maitland, 11 G. & J. 286. An agent authorized to receive the debt in money, cannot take a note or bill, or a banker's check. Ward *v.* Evans, 2 Ld. Raym. 930, 2 Salk. 442; Thorold *v.* Smith, 11 Mod. 71, 87; or other personal property. Doct. & Stud. 286. So, an agent authorized to sell, must sell for money, and cannot barter. Howard *v.* Chapman, 4 C. & P. 508; Guerreiro *v.* Peile, 3 B. & Ald. 616; Hays *v.* Stone, 7 Hill, 135, 136. When authorized to receive payment by a note, he cannot pledge or otherwise dispose of it. Jones *v.* Farley, 6 Greenl. 226; Hays *v.* Lynn, 7 Watts, 524.

[4] Stewart *v.* Aberdein, 4 M. & W. 211. So, where an agent is authorized to pay, out of the sum to be collected by him as agent, a debt due to him from the principal. In Barker *v.* Greenwood, 2 Young & Coll. 418, *Alderson*, B., says: "If a man, being indebted to his own agent, authorize that agent to receive money due to him from his debtor, intending that he should thereout pay himself his own debt, does he authorize that agent impliedly, to the extent at least of that debt, to receive payment in any way he may think fit? I think he does. An agent with a general authority like this, is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor. And a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this, his duty. If, therefore, the agent be not a creditor of his principal, he must receive the whole in cash; for, otherwise, he does not, by the act done between him and the debtor, put himself into the situation of being able to pay it over. Such were the cases of Todd *v.* Reid, 4 B. & Ald. 210; Russell *v.* Bangley, 4 B. & Ald. 395; Bartlett *v.* Pentland, 10 B. & C. 760; Scott *v.* Irving, 1 B. & Ad. 605. For in those cases, the assured was entitled, as between himself and the broker, to the whole amount which the latter might have received in cash from the underwriter. But if the agent be himself a creditor of the principal, and the principal intends, when he makes him his agent to receive, that he shall retain his own debt out of the sum received, his only duty is to pay over to the principal the balance, after deducting his own debt. If he, therefore, takes care to receive in cash that balance, he, as it seems to me, puts himself into a situation as completely to discharge his duty as if he had received the whole in cash. For, what possible difference can it make to the principal, whether his agent receives the whole and retains part, or only receives that balance which he himself is entitled to receive from the agent. A person, however, who does not take the ordinary and proper course of

In general, although a principal may be responsible for the deliberate fraud of his agent in the execution of his employment, he is not responsible for his *criminal* acts, unless he expressly commanded them.[1] There is, however, a class of cases in which the principal has intrusted property to his agent, and the agent has used it illegally; and this act of the agent is *primâ facie* evidence, sufficing, if unexplained, to render the principal liable criminally, without proof of his direct participation in the act itself. The smuggling of goods, the issue of libellous publications, and the sale of intoxicating liquors, by agents, belong to this class.[2]

SECTION VIII.

MUTUAL RIGHTS AND DUTIES OF PRINCIPAL AND AGENT.

An agent cannot depart from his instructions without making himself liable to his principal for the consequences.[3] In determining the purport or extent of his instructions, custom and usage in like cases will often have great influence; because, on the one hand, the agent is entitled to all the advantages which a known and established usage would give him; and on the other, the principal has a right to expect that his agent will conduct himself according to such usage.[4] But usage is never permitted

paying the whole in money, must take care to be able to prove that the agent is in this situation. If, therefore, he pays by settlement in account, he takes upon himself, in such a case as this, the risk of being able to show the debt due from the principal to the agent, and the specific circumstances under which the agent was appointed to receive the money."

[1] Hern *v.* Nichols, 1 Salk. 289, per *Holt*, J. C.; Crockford *v.* Winter, 1 Camp. 124; Rex *v.* Huggins, 2 Str. 885.

[2] Rex *v.* Almon, 5 Burr. 2686; Rex *v.* Gutch, M. & Mal. 433; Attorney-General *v.* Siddon, 1 Cro. & Jerv. 220; Commonwealth *v.* Nichols, 10 Met. 259.

[3] Anonymous, 2 Mod. 100; Chapman *v.* Morton, 11 M. & W. 540; Rundle *v.* Moore, 3 Johns. Cas. 36; Liotard *v.* Graves, 3 Caines, 238; Leverick *v.* Meigs, 1 Cow. 645; Manella *v.* Barry, 3 Cranch, 415, 439; Kingston *v.* Kincaid, 1 Wash. C. C. 454; Loraine *v.* Cartwright, 3 Wash. C. C. 151; Day *v.* Crawford, 13 Geo. 508; Evans *v.* Root, 3 Selden, 186. "And no motive connected with the interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of the instructions." Per *Washington*, J., in Courcier *v.* Ritter, 4 Wash. C. C. 551. But there are cases of unexpected emergencies which have been held to justify a departure from the instructions, when such departure was for the certain benefit of the principal. Williams *v.* Shackelford, 16 Ala. 318; Davis *v.* Waterman, 10 Vt. 526; Perez *v.* Miranda, 19 Martin, 494. Such emergencies arise mainly where the agent is a master of a vessel, a supercargo, or a foreign factor, and are peculiar to the law-merchant. See Dusar *v.* Perit, 4 Binn. 361.

[4] Marzetti *v.* Williams, 1 B. & Ad. 415; Sutton *v.* Tatham, 10 Ad. & El. 27; Sykes

to prevail over express instructions.[1] A principal who accepts the benefit of an act done by his agent beyond or aside from his instructions, discharges the agent from responsibility therefor.[2] And any delay in renouncing the transaction as soon as he can, or any inclination to wait and make a profit out of it, is an acceptance of the act.[3] But if the agent has bought goods for his principal without authority, the latter may renounce the sale, and, nevertheless, hold the goods if he has advanced money on them.[4]

In general, every agent is entitled to indemnity from his principal, when acting in obedience to his lawful orders,[5] or when he, in conformity with his instructions, does an act which is not wrong in itself, and which he is induced by his principal to suppose right at that time.[6]

An attorney or agent cannot appoint a sub-attorney or agent, unless authorized to do so expressly, or by a certain usage, or the obvious reason and necessity of the case.[7] And a sub-agent,

v. Giles, 5 M. & W. 645; Kingston *v.* Wilson, 4 Wash. C. C. 310. Nor need the usage be known to the principal. Pollock *v.* Stables, 12 Q. B. 765; Bayliffe *v.* Butterworth, 1 Exch. 425.

[1] Catlin *v.* Bell, 4 Camp. 184; Guerreiro *v.* Peile, 3 B. & Al. 616; Parkist *v.* Alexander, 1 Johns. Ch. 394. As, where the authority is in writing. Attwood *v.* Munnings, 7 B. & C. 278; Johnston *v.* Usborne, 11 A. & E. 557; Schimmelpennich *v.* Bayard, 1 Pet. 264; Delafield *v.* Illinois, 26 Wend. 192.

[2] Clarke *v.* Perrier, 2 Freem. 48; Prince *v.* Clark, 1 B. & C. 186; Owsley *v.* Woolhopter, 14 Geo. 124.

[3] Prince *v.* Clark, 1 B. & Cr. 186; Cornwal *v.* Wilson, 1 Ves. Sen. 509.

[4] Cornwal *v.* Wilson, 1 Ves. Sen. 509; per Lord *Eldon*, in Kemp *v.* Pryor, 7 Ves. 240, 247; per *Bayley*, J., in Prince *v.* Clark, 1 B. & Cr. 190.

[5] Westropp *v.* Solomon, 8 C. B. 345; D'Arcy *v.* Lyle, 5 Binn. 441; Ramsay *v.* Gardner, 11 Johns. 439; Powell *v.* The Trustees of Newburgh, 19 id. 284; Hill *v.* Packard, 5 Wend. 375; Rogers *v.* Kneeland, 10 id. 218; Gower *v.* Emery, 18 Maine, 79.

[6] Adamson *v.* Jarvis, 4 Bing. 66; Betts *v.* Gibbins, 2 A. & E. 57; Allaire *v.* Ouland, 2 Johns. Cas. 56; Coventry *v.* Barton, 17 Johns. 142; Avery *v.* Halsey, 14 Pick. 174.

[7] Coombe's case, 9 Rep. 75, b, 76, a; Schmaling *v.* Thomlinson, 6 Taunt. 147; Tippets *v.* Walker, 4 Mass. 595; Stoughton *v.* Baker, 4 Mass. 522; Emerson *v.* Providence Manuf. Co. 12 Mass. 237; Brewster *v.* Hobart, 15 Pick. 302; Lyon *v.* Jerome, 26 Wend. 485; Hunt *v.* Douglass, 22 Vt. 128; Andover *v.* Grafton, 7 N. H. 304; Dispatch Line *v.* Bellamy Manuf. Co. 12 N. H. 228; Wilson *v.* York and Maryland Line R. R. Co. 11 G. & J. 74. A broker cannot delegate his authority. Cockran *v.* Irlam, 2 M. & S. 301, note; Henderson *v.* Barnewall, 1 Y. & Jerv. 387. Nor can a factor. Solly *v.* Rathbone, 2 M. & S. 298; Catlin *v.* Bell, 4 Camp. 183; Warner *v.* Martin, 11 How. 209. But the power to perform a merely ministerial act, involving the exercise of no discretion, may be delegated. Mason *v.* Joseph, 1 Smith, 406, per Lord *Ellenborough;* Lyon *v.* Jerome, 26 Wend. 485; Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 501; Powell *v.* Tuttle, 3 Comst. 396; Gillis *v.* Bailey, 1 Foster, 149. See Blore *v.* Sutton, 3 Meriv. 237. So, where the appointment of a sub-agent is necessary and according to usage. Moon *v.* Guardians of Witney Union, 3 Bing. N. C. 814; Dorchester and Milton Bank *v.* New England Bank, 1 Cush. 177; Warner *v.* Martin, 11 How. 224. Thus, a consignee or agent for the sale of merchandise may employ a broker for the purpose, when such is the usual course of business. Trueman *v.* Loder, 11 Ad. & El. 589; Warner *v.* Martin, 11 How. 223. The unauthorized ap-

appointed without such authority, is only the agent of the agent, and not of the principal.[1]

An agent is bound to use, in the affairs of his principal, all that care and skill which a reasonable man would use in his own. And he is also bound to the utmost good faith.[2] Where, however, an agent acts gratuitously, without an agreement for compensation, or any legal right to compensation growing out of his services, less than ordinary diligence is, in general, required of him, and he will not be held responsible for other than gross negligence.[3] But a gratuitous agent will be held responsible for property intrusted to him.[4] For any breach of duty, an agent is responsible for the whole injury thereby sustained by his principal; and, generally, a verdict against the principal for misconduct of the agent, measures the claim of the principal against the agent.[5] The loss must be capable of being made certain and definite; and then the agent is responsible if it could not have happened but for his misconduct, although not immediately caused by it.[6] If any agent embezzles his employer's property, it is quite clear that the employer may reclaim it whenever he can distinctly trace and identify it. But if it be blended indistinguishably with the agent's own goods, and the agent die or become insolvent, the principal can claim only as a common creditor, as against other creditors;[7] but as

pointment of a sub-agent, when ratified by the principal, binds him in the same manner as if originally authorized. Doe d. Rhodes *v.* Robinson, 3 Bing. N. C. 677; Mason *v.* Joseph, 1 Smith, 406; McKenzie *v.* Nevius, 22 Maine, 138.

[1] Cobb *v.* Becke, 6 Q. B. 930; Stephens *v.* Badcock, 3 B. & Ad. 354. But if the appointment was authorized expressly or by implication, the sub-agent is the agent of the principal. McKenzie *v.* Nevius, 22 Maine, 138; Wilson *v.* Smith, 3 How. 763.

[2] Co. Litt. 89, a; Chapman *v.* Walton, 10 Bing. 57; Lawler *v.* Keaquick, 1 Johns. Cas. 174; Kingston *v.* Kincaid, 1 Wash. C. C. 454.

[3] Doorman *v.* Jenkins, 2 A. & El. 256; Balfe *v.* West, 22 Eng. Law and Eq. 506; Lyon *v.* Tams, 6 English, (Ark.) 189. Unless such person holds himself out as exercising one of certain privileged professions or trades, as that of attorney, in which case, it seems, he will be bound to exercise the skill appropriate to such trade or profession. Dartnall *v.* Howard, 4 B. & C. 345; Shiells *v.* Blackburne, 1 H. Bl. 158; Lanphier *v.* Phipos, 8 C. & P. 479; Denew *v.* Daverell, 3 Camp. 451. See Wilson *v.* Brett, 11 M. & W. 113; 1 Parsons on Contracts, pp. 73, 581–586.

[4] Stewart *v.* Frazier, 5 Ala. 114.

[5] Mainwaring *v.* Brandon, 8 Taunt. 202; Green *v.* N. R. Co. 4 T. R. 589.

[6] Park *v.* Hamond, 4 Camp. 344, 6 Taunt. 495; Mallough *v.* Barber, 4 Camp. 150; Smith *v.* Lascalles, 2 T. R. 187; Davis *v.* Garrett, 6 Bing. 716; Short *v.* Skipwith, 1 Brock. 103; De Tastett *v.* Crousillat, 2 Wash. C. C. 132; Morris *v.* Summerl, 2 id. 203; Hays *v.* Stone, 7 Hill, 136. But the loss must be capable of being ascertained with reasonable certainty. Webster *v.* De Tastet, 7 T. R. 157; The Amiable Nancy, 3 Wheat. 560; Bell *v.* Cunningham, 3 Pet. 84, 85; Smith *v.* Condry, 1 How. 28.

[7] Thompson *v.* Perkins, 3 Mason, 232.

against the factor himself, the whole seems to belong to the principal.[1]

An agent employed to sell property, cannot buy it himself;[2] and if employed to buy, he cannot buy of himself, unless expressly authorized to do so.[3] Nor can a trustee purchase the property he holds in trust for another.[4]

Among the obvious duties of all agents is that of keeping an exact account of their doings, and particularly of all pecuniary transactions.[5] After a reasonable time has elapsed, the court will presume that such an account was rendered, accepted, and settled.[6] Otherwise, every agent might always remain liable to be called upon for such account. Moreover, he is liable not only for the balances in his hands, but for interest,[7] or even, where there has been a long delay to the profit of the agent, he might,

[1] Lupton *v.* White, 15 Ves. 436; Chedworth *v.* Edwards, 8 id. 46; Wren *v.* Kirton, 11 Ves. 377; Hart *v.* Ten Eyck, 2 Johns. Ch. 62.

[2] Wren *v.* Kirton, 8 Ves. 502; Morse *v.* Royal, 12 id. 355; Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Moore *v.* Moore, 1 Selden, 256; Church *v.* Sterling, 16 Conn. 400; Bartholemew *v.* Leech, 7 Watts, 472; Baker *v.* Whiting, 3 Sumner, 476; Copeland *v.* Mercantile Ins. Co. 6 Pick. 204. A sub-agent is under the same disability. Baker *v.* Whiting, 1 Story, 241. Nor can the agent of a principal, authorized to sell, purchase for another. Hawley *v.* Cramer, 4 Cow. 717; Harrison *v.* McHenry, 9 Geo. 164. If an agent or attorney is entitled to purchase, yet if, instead of openly purchasing, he purchase in the name of a trustee or agent without disclosing the fact, no such purchase can stand. Lewis *v.* Hillman, 3 House of Lords' Cases, 630.

[3] Lees *v.* Nuttall, 2 M. & K 819; Taylor *v.* Salmon, 4 M. & Cr. 139.

[4] Nesbitt *v.* Tredennick, 1 Ball & Beatty, 46, 47; De Caters *v.* Le Roy De Chaumont, 3 Paige, 178; Slade *v.* Van Vetchen, 11 Paige, 26.

[5] Lord Chedworth *v.* Edwards, 8 Ves. 49; Lady Ormond *v.* Hutchinson, 13 id. 47; Lord Hardwicke *v.* Vernon, 14 id. 510; Lupton *v.* White, 15 id. 436; Pearse *v.* Green, 1 Jac. & Walker, 135; Collyer *v.* Dudley, Turn. & Russ. 421; Clark *v.* Moody, 17 Mass. 148. A servant, intrusted with money for the payment of tradesmen's bills, it is said, is not liable to account. Terry *v.* Wacher, 15 Sim. 448. Nor is the agent of an agent, who is not the sub-agent of the principal, accountable to the principal. Stephens *v.* Badcock, 3 B. & Ad. 354; Cartwright *v.* Hateley, 1 Ves. Jr. 292; Sims *v.* Brittain, 4 B. & Ad. 375; Tripler *v.* Olcot, 3 Johns. Ch. 473. A demand by the principal must precede an action against an agent for not accounting or for not paying over the proceeds of a sale or money collected. Topham *v.* Braddick, 1 Taunt. 572; Taylor *v.* Bates, 5 Cow. 376; Rathbun *v.* Ingalls, 7 Wend. 320; Brink *v.* Dolsen, 8 Barb. 337; Hall *v.* Pecke, 10 Vt. 474; Hutchins *v.* Gilman, 9 N. H. 359; Sally *v.* Capps, 1 Ala. 121; Potter *v.* Sturges, 1 Dev. 79; White *v.* Miller, 3 Dev. & Batt, 55; State *v.* Sugg, 3 Iredell, 96; Waring *v.* Richardson, 11 id. 77; Armstrong *v.* Smith, 3 Blackf. 251; Judah *v.* Dyott, 3 id. 324. But no demand is necessary where the agent denies his agency, or unreasonably neglects to account, or is otherwise in default. Tillottson *v.* McCrillis, 11 Vt. 477; Ferris *v.* Paris, 10 Johns. 285; Cooley *v.* Betts, 24 Wend. 203; Wait *v.* Gibbs, 7 Pick. 146; Langley *v.* Sturtevant, 7 id. 214; Witherup *v.* Hill, 9 S. & R. 11.

[6] Topham *v.* Braddick, 1 Taunt. 572.

[7] Brown *v.* Southouse, 3 Bro. C. C. 107; Williams *v.* Storrs, 6 Johns. Ch. 353; People *v.* Gasherie, 9 Johns. 71; Dodge *v.* Perkins, 9 Pick. 368. So the principal is entitled to all increase or profit made by the agent in the use of the principal's property. Diplock *v.* Blackburn, 3 Camp. 43; Brown *v.* Litton, 1 P. Wms. 141; Massey *v.* Davies, 2 Ves. Jr. 317; Hays *v.* Stone, 7 Hill, 135.

perhaps, be liable for compound interest, on the same ground on which it has been charged in analogous cases against executors, trustees, and guardians.[1] No interest whatever would be charged if such were the intention of the parties, or the effect of the bargain between them; and this intention may be inferred either from direct or circumstantial evidence, — as the nature of the transaction, or the fact that the principal knew that the money lay useless in the agent's hands, and made no objection or claim.[2]

Although, as we have seen, the revocation of authority is generally within the power of the principal, an agent ought not to suffer damage from acting under a revoked authority, if the revocation were wholly unknown to him without his fault.[3] But where his authority was only a general one, he has been held liable to the assignees for acts done by him after his principal's bankruptcy.[4]

One requested to act as agent, and agreeing to do so, but not beginning his work, nor being intrusted with property for the employment, is not liable for not doing what he undertakes, unless he has a consideration for his undertaking.[5]

SECTION IX.

OF FACTORS AND BROKERS.

All agents who sell goods for their principals, and guarantee the price, are said abroad to act under a *del credere commission*.[6]

[1] See 1 Parsons on Cont. 103, 115; Ackerman *v.* Emott, 4 Barb. 626.

[2] Beaumont *v.* Boultbee, 11 Ves. 360; Rogers *v.* Boehm, 2 Esp. 704; Williams *v.* Storrs, 6 Johns. Ch. 353.

[3] United States *v.* Jarvis, Davies, 287. In this case it was held, by *Ware*, J., that the power of an agent may be revoked at any time by the principal without notice; but if the agent, in the prosecution of the business of his principal, has fairly and in good faith, before notice of the revocation of his powers, entered into any engagements or come under any liabilities, the principal will be bound to indemnify him. So an agent, after accepting an agency, cannot renounce it at pleasure, without notice or good cause, without rendering himself responsible for any loss which may thereby be sustained by the principal.

[4] Pearson *v.* Graham, 6 A. & Ell. 899.

[5] Elsee *v.* Gatward, 5 T. R. 143; Balfe *v.* West, 22 Eng. Law and Eq. 506; Thorne *v.* Deas, 4 Johns. 84.

[6] A *del credere* commission confers no additional power on the factor. Morris *v.* Cleasby, 4 M. & S. 566; Thompson *v.* Perkins, 3 Mason, 232. But it does in the case of a broker. White *v.* Chouteau, 10 Barb. 202.

In this country, this phrase is seldom used, nor is such guaranty usually given, except by commission merchants. And where such guaranty is given, the factor is still but a surety, so far that his employers must first have recourse to the principal debtor.[1] But his promise is not "a promise to pay the debt of another," within the Statute of Frauds.[2] Nor does he guarantee the safe arrival of the money received by him in payment of the goods, and transmitted to his employer, but must use proper caution in sending it.[3] If he takes a note from the purchaser, this note is his employer's;[4] and if he takes depreciated or bad paper, he must make it good.[5]

A broker or factor is bound to the care and skill properly belonging to the business which he undertakes, and is responsible for the want of it.[6]

A factor intrusted with goods, may pledge them for advances to his principal, or for advances to himself to the extent of his lien.[7]

The mere wishes or intimations of his employer bind him only so far as they are instructions;[8] these he must obey; but may

[1] Peele *v.* Northcote, 7 Taunt. 478; Gall *v.* Comber, 7 id. 558; Thompson *v.* Perkins, 3 Mason, 232; Wolff *v.* Koppel, 5 Hill, 458, 2 Denio, 368. In which last case conflicting opinions were given. The contrary doctrine seems to have prevailed at an early date, which made the factor liable absolutely and in the first instance. Grove *v.* Dubois, 1 T. R. 112; Haughton *v.* Matthews, 3 B. & P. 485; Leverick *v.* Meigs, 1 Cow. 663, 664. "The selling under a *del credere* commission, while it secures the amount of the sales to the principal, does not in law require the factor to anticipate the credit; and the principal is only entitled to have the amount passed to his credit when the sale is matured." Per *Hubbard*, J., in Upham *v.* Lefavour, 11 Met. 185.

[2] Swan *v.* Nesmith, 7 Pick. 220; Wolff *v.* Koppell, 5 Hill, 458, 2 Denio, 368; Bradley *v.* Richardson, 23 Vt. 731, 732; Couturier *v.* Hastie, 16 Eng. Law and Ex. 562, 8 Exch. 40; 2 Parsons on Cont. 307.

[3] Muhler *v.* Bohlens, 2 Wash. C. C. 378. But see Lucas *v.* Groning, 7 Taunt. 164; Mackenzie *v.* Scott, 6 Bro. P. C. 280.

[4] West Boylston Manuf. Co. *v.* Searle, 15 Pick. 225; Pitts *v.* Mower, 18 Maine, 361.

[5] Dunnell *v.* Mason, 1 Story, 543.

[6] See *ante*, p. 156, n. 3; Vere *v.* Smith, 1 Vent. 121.

[7] M'Combie *v.* Davies, 7 East, 5; Solly *v.* Rathbone, 2 M. & S. 298; Pultney *v.* Keymer, 3 Esp. 182; Urquhart *v.* McIver, 4 Johns. 116; Warner *v.* Martin, 11 How. 225. So, an innocent pledgee may hold the pledge where the owner has held for the agent as principal. Boyson *v.* Coles, 6 M. & S. 14; Williams *v.* Barton, 3 Bing. 139; Warner *v.* Martin, *supra*. The power of a factor to pledge the goods of his principal has recently been enlarged, by statute, in England and in many of our States. See 1 Parsons on Cont. 50, n. (*g*).

[8] Brown *v.* M'Gran, 14 Pet. 480. In Marfield *v.* Douglass, 1 Sandf. 360, 405, S. C., *nom.* Marfield *v.* Goodhue, 3 Comst. 62, a principal wrote to his factor, giving his views of the propable supply of the article consigned, and stating facts which indicated a short supply. In conclusion he said: "I have thought it best for you to take my pork out of the market for the present, as thirty days will make an important change in the value of the article." It was held that the letter constituted instructions to the factor to withhold the property from sale until the receipt of further directions. So, of

still, as we have already stated, depart from their letter, if in good faith, and for the certain benefit of his employer, in an unforeseen exigency.[1] Having possession of the goods, he may insure them; but is not bound to do so, nor even to advise insurance; unless requested, or unless a distinct usage makes this his duty.[2] He has much discretion as to the time, terms, and manner of a sale, but must use this discretion in good faith. For a sale which is precipitated by him, without reason and injuriously, is void, as unauthorized.[3] If he send goods to his principal without order, or contrary to his duty, the principal may return them, or in good faith and for the benefit of the factor, may sell them as the factor's goods.[4]

Although a factor have no *del credere* commission, he is liable to his principal for his own default; or if he sells on credit, and, when it expires, takes a note to himself;[5] but if he takes at the time of the sale a negotiable note from a party in fair credit, and the note is afterward dishonored, this is the loss of his employer, unless the factor has guaranteed it.[6] If he sells the goods of many owners to one purchaser, taking a note for the whole to himself, and gets it discounted for his own use or accommodation, he is then liable for the payment of that note.[7] So, if he gets discounted for his own use a note taken wholly for his principal's goods.[8] But he may discount them to reimburse himself

a similar letter, saying: "But thirty days will tell the story; with these facts before me, I have thought best to hold on to my pork, and I wish you to take it out of the market for the present." And *Sandford*, J., said: "In our view, the letters were not ambiguous, nor calculated to mislead the defendants. They contain a plain direction to withhold the plaintiff's pork from the market; not couched in imperious or abrupt language, which was wholly unnecessary; but in such language as any courteous man would use to another, expressing a decisive wish and conclusion that his pork should be withheld from sale. This constituted instructions from the principal to the factors to pursue the course indicated."

[1] See *ante*, p. 154, n. 3.

[2] De Forest *v.* The Fire Ins. Co. 1 Hall, 84; Brisban *v.* Boyd, 4 Paige, 17.

[3] Shaw *v.* Stone, 1 Cush. 228, 248.

[4] Kemp *v.* Pryor, 7 Ves. Jr. 237; Cornwal *v.* Wilson, 1 Ves. Sr. 509.

[5] Hosmer *v.* Beebe, 14 Martin, 368. And see *ante*, p. 154, n. 3.

[6] Goodenow *v.* Tyler, 7 Mass. 36; Greely *v.* Bartlett, 1 Greenl. 172; Rogers *v.* White, 6 id. 193; Goldthwaite *v.* M'Whorter, 5 Stew. & Port. 284; Kidd *v.* King, 5 Ala. 84; Messier *v.* Amery, 1 Yeates, 540; Towns *v.* Birchett, 12 Leigh, 173; Hamilton *v.* Cunningham, 2 Brock. 350. The mere taking by the factor of a note payable to himself, which includes the purchase-money of goods belonging to several principals, does not render the factor personally liable for the maker's solvency. Corlies *v.* Cumming, 6 Cow. 181. So, where the note includes a debt due to the principal, and a debt due to himself. Hapgood *v.* Batcheller, 4 Met. 573.

[7] Johnson *v.* O'Hara, 5 Leigh, 456; Byrne *v.* Schwing, 6 B. Monr. 199.

[8] Myers *v.* Entriken, 6 W. & S. 44. See Wren *v.* Kirton, 11 Ves. 382.

for advances, without making himself liable.[1] If he sends his own note for the price to his employer, he must pay it.[2]

A factor may have a claim against a purchaser founded on his lien upon the goods for advances, while the principal has a claim for the price. But, generally, a purchaser, paying either principal or factor, will be protected against the other, unless he had knowledge or notice of the adverse valid claim of the other.[3]

As a factor has possession of the goods, he may use his own name in all his transactions, even in suits at law; but a broker can buy, sell, receipt, &c., only in the name of his employer.[4] So, a factor has a lien on the goods in his hands, for his advances, his expenses, and his commissions, and for the balance of his general account. And the factor may sell from time to time, enough to cover his advances, unless there be something in his employment or in his instructions, from which it may be inferred that he had agreed not to do so.[5] But a broker, having no possession, has no lien. The broker may act for both parties, and often does so.[6] But, from the nature of his employment, a factor should act only for the party employing him.[7] A broker has no authority to receive payment for the goods he sells, unless that authority be given him, expressly or by implication.[8] Nor will

[1] Towns *v.* Birchett, 12 Leigh, 173.

[2] Simpson *v.* Swan, 3 Camp. 291; Le Fever *v.* Lloyd, 5 Taunt. 749; Goupy *v.* Harden, 7 id. 159; Jackson *v.* Bossonette, 24 Vt. 611. See Shaw *v.* Picton, 4 B. & C. 715.

[3] Drinkwater *v.* Goodwin, Cowper, 251; Coppin *v.* Craig, 7 Taunt. 243; Hudson *v.* Granger, 5 B. & Ald. 27; Atkyns *v.* Amber, 2 Esp. 493.

[4] Baring *v.* Corrie, 2 B. & Ald. 137, 143, 148; Warner *v.* M'Kay, 1 M. & W. 591. But a broker may act in his own name, if he is specially authorized so to act. Kemble *v.* Atkins, 7 Taunt. 260. If he has made advances on the goods sold by him, or guaranteed the sale, he may sue in his own name. Grove *v.* Dubois. 1 T. R. 112; Atkyns *v.* Amber, 2 Esp. 493; Buckbee *v.* Brown, 21 Wend. 110; White *v.* Chouteau, 10 Barb. 202.

[5] Brown *v.* McGran, 14 Pet. 479; Parker *v.* Brancker, 22 Pick. 40; Frothingham *v.* Everton, 12 N. H. 239; Blot *v.* Briceau, 3 Comst. 78; Marfield *v.* Goodhue, 1 Sandf. 360, 3 Comst. 62; Porter *v.* Patterson, 15 Penn. St. 229. See Smart *v.* Sandars, 3 C. B. 380, 5 id. 895. In Upham *v.* Lefavour, 11 Met. 174, it was held that a factor who makes advances on goods consigned to him, may maintain an action, before the goods are sold, to recover the money advanced, unless there is an agreement to the contrary.

[6] Colvin *v.* Williams, 3 H. & J. 38.

[7] Rucker *v.* Cammeyer, 1 Esp. 105; Hinde *v.* Whitehouse, 7 East, 558, 569; Henderson *v.* Barnewall, 1 You. & Jerv. 387; Beal *v.* M'Kiernan, 6 Louis. 417.

[8] Baring *v.* Corrie, 2 B. & Ald. 137; Campbell *v.* Hassell, 1 Stark. 233. An insurance broker may receive payment, but only in money, and cannot set off a debt due from himself to the purchaser. Todd *v.* Reid, 4 B. & Ald. 210; Russell *v.* Bangley, 4 id. 395; Bartlett *v.* Pentland, 10 B. & C. 760; Scott *v.* Irving, 1 B. & Ad. 605. Payment to the broker is good if the principal has held him out as the owner. Campbell *v.* Hassell, *supra;* Morris *v.* Cleasby, 1 M. & S. 566; Coates *v.* Lewis, 1 Camp. 444; Favenc *v.* Bennett, 11 East, 36; Kemble *v.* Atkins, 7 Taunt. 260.

payment to a factor discharge a debtor who has received notice from the principal not to make such payment.[1]

Generally, neither factor nor broker can claim their commissions until their whole service be performed, and in good faith, and with proper skill, care, and industry.[2] But if the service begins, and is interrupted wholly without their fault, they may claim a proportionate compensation.[3] If either bargains to give his whole time to his employer, he will not be permitted to derive any compensation for services rendered to other persons.[4] Nor can either have any valid claim against any one for illegal services, or those which violate morality or public policy.[5]

A principal cannot revoke an authority given to a factor, after advances made by the factor, without repaying or securing the factor.[6]

The distinction between a *foreign* and a *domestic* factor is quite important. A domestic factor is one who is employed and acts in the same country with his principal. A foreign factor is one employed by a principal who lives in a different country. And a foreign factor is as to third parties — for most purposes and under most circumstances — a principal. Thus, they cannot sue the principal, because they are supposed to contract with the factor alone, and on his credit, although the principal may sue them;[7] and a foreign factor is personally liable, although he

[1] Moore *v.* Clementson, 2 Camp. 22; Gardiner *v.* Davis, 2 C. & P. 49; Hornby *v.* Lacy, 6 M. & S. 166; Edmond *v.* Caldwell, 15 Maine, 340. Payment to an agent authorized to receive it, may be made before it becomes due. Patten *v.* Fullerton, 27 Maine, 58.

[2] Hamond *v.* Holiday, 1 C. & P. 384; Dalton *v.* Irvin, 4 id. 289; Broad *v.* Thomas, 7 Bing. 99; Read *v.* Rann, 10 B. & C. 438; Hill *v.* Kitching, 3 C. B. 299. And the factor's negligence may be given in evidence to reduce his compensation, or bar all claim therefor. Hamond *v.* Holiday, *supra;* Denew *v.* Daverell, 3 Camp. 451; Moneypenny *v.* Hartland, 1 C. & P. 352; White *v.* Chapman, 1 Stark. 113; Hurst *v.* Holding, 3 Taunt. 32; Shaw *v.* Arden, 9 Bing. 287; Dodge *v.* Tileston, 12 Pick. 328.

[3] See cases *supra.* And see further, Fenton *v.* Clark, 11 Vt. 557; Seaver *v.* Morse, 20 id. 620; Dickey *v.* Linscott, 20 Maine, 453; Fuller *v.* Brown, 11 Met. 440.

[4] Thompson *v.* Havelock, 1 Campb. 527; Gardner *v.* M'Cutcheon, 4 Beavan, 534.

[5] Haines *v.* Busk, 5 Taunt. 521; Joseph *v.* Pebrer, 3 B. & C. 639; Waldo *v.* Martin, 4 id. 319. But where the employment of the agent, which was occasioned by an illegal enterprise, is subsequent to and disconnected with the illegality, he may recover his compensation. Toler *v.* Armstrong, 4 Wash. C. C. 297, 11 Wheat. 258; Wooten *v.* Miller, 7 S. & M. 380; Howell *v.* Fountain, 3 Geo. 176.

[6] Brown *v.* McGran, 14 Pet. 479, 495; Marfield *v.* Goodhue, 3 Comst. 62; Blot *v.* Boiceau, 3 Comst. 78. But see Smart *v.* Sandars, 5 C. B. 895; Raleigh *v.* Atkinson, 6 M. & W. 670.

[7] De Gaillon *v.* Aigle, 1 B. & P. 368; Gouzales *v.* Sladen, Bull. N. P. 130; Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandassequi, 4 Taunt. 574; Thompson *v.* Davenport, 9 B. & C. 78; Merrick's Estate, 5 W. & S. 9; Newcastle Manuf. Co. *v.* Red River R. R. Co. 1 Rob. (La.) 145. See Smyth *v.* Anderson, 7 C. B. 21.

fully disclose his agency, and his principal is known.[1] But this doctrine is not extended to cases where a contract for personal services is made in the country where the factor is doing business, by a person resident there, but the contract is to be performed or executed in the country where the principal resides. For, if such a contract be made in the name of the principal, he alone is responsible.[2] One who deals with a domestic factor, may sue the principal, unless it is shown that credit was given exclusively to the factor.[3] And for the purpose of this distinction, and the rules founded upon it, we hold, on the weight of authority, that our States are foreign to each other.[4]

Every factor is bound to reasonable care; and he is liable for a loss by fire, or robbery, or other accident, occurring without his default, if he had previously done some wrongful act, without which the property might have been safe.[5] And this rule would apply even to a gratuitous agent.[6]

[1] McKenzie *v.* Nevius, 22 Maine, 138.
[2] Rogers *v.* March, 33 Maine, 106.
[3] Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandassequi, 4 Taunt. 574.
[4] Kirkpatrick *v.* Stainer, 22 Wend. 244; Taintor *v.* Prendergast, 3 Hill, 72. England and Scotland do not seem to be foreign countries in respect to this rule. Thompson *v.* Davenport, 9 B. & C. 78.
[5] Caffrey *v.* Darby, 6 Ves. 496; Hays *v.* Stone, 7 Hill, 136; Davis *v.* Garrett, 6 Bing. 716; Evans *v.* Root, 3 Selden, 186.
[6] Stewart *v.* Frazier, 5 Ala. 114.

CHAPTER XI.

PARTNERSHIP.

SECTION I.

WHAT A PARTNERSHIP IS.

When two or more persons combine their property, labor, or skill, for the transaction of business for their common profit,[1] they enter into partnership. Sometimes the word "firm" is used as synonymous with partnership; sometimes, however, it seems to mean only the copartnership-name.

A single joint transaction out of which, considered by itself, neither profit nor loss arises, will not create a partnership.[2] If a joint purchase be made, and each party then takes his distinct and several share, this is no partnership.[3] But it seems that there will be a partnership if the joint transactions actually and materially enlarge the value of the property, although the respective shares are divided among the holders without a sale.[4] But a joint contract to do a piece of work, if the price for it is to be divided immediately among those entitled to it, will not make them partners.[5]

[1] The object of the joint transactions must be the common profit. Hence, a deed of assignment in the usual form to trustees for the benefit of creditors, which empowers the trustees to carry on the business of the debtor, for the purpose of closing up his affairs, does not create a partnership between the creditors. Coate *v.* Williams, 9 Eng. Law and Eq. 481; Janes *v.* Whitbread, 5 Eng. Law and Eq. 431. As to charitable associations and clubs, see Beaumont *v.* Meredith, 3 Ves. & B. 180; Delauney *v.* Strickland, 2 Stark. 416; Flemyng *v.* Hector, 2 Mee. & W. 172.

[2] As, if tenants in common give a joint order for the sale of their property. Jackson *v.* Robinson, 3 Mason, 140. See Hall *v.* Leigh, 8 Cranch, 50; Sims *v.* Willing, 8 Ser. & R. 103.

[3] Hoare *v.* Dawes, Doug. 371; Coope *v.* Eyre, 1 H. Bl. 37; Gibson *v.* Lupton, 9 Bing. 297; Post *v.* Kimberly, 9 Johns. 470; Barton *v.* Williams, 5 B. & Ald. 395; Holmes *v.* United Ins. Co. 2 Johns. Cas. 329; Felichy *v.* Hamilton, 1 Wash. C. C. 491; Ballou *v.* Spenser, 4 Cow. 163; Harding *v.* Foxcroft, 6 Greenl. 76; Gilmore *v.* Black, 2 Fairf. 485; Brady *v.* Calhoun, 1 Pennsyl. 140, 147.

[4] Everitt *v.* Chapman, 6 Conn. 347; Musier *v.* Trumpbour, 5 Wend. 275. See Loomis *v.* Marshall, 12 Conn. 69; Bucknam *v.* Barnum, 15 Conn. 73.

[5] Finch *v.* Stacy, Select Cas. in Ch. 9; Porter *v.* M'Clure, 15 Wend. 187.

Any persons competent to transact business on their own account, may enter into partnership for that purpose; and no others.

SECTION II.

HOW A PARTNERSHIP MAY BE FORMED.

No especial form or manner is necessary. It may be by oral agreement, or by a written agreement,[1] which may have a seal or not. But the liability and authority of the partners begins with the *actual* formation of the partnership, and does not wait for the execution of any articles.[2] In general, if there be an agreement to enter into business, or some particular transactions, together, and share the profits and losses, this constitutes a partnership, which is just as extensive as the business proposed to be done, and not more so. The parties may agree to share the profits in what proportion they choose; but in the absence of any agreement, the law presumes equal shares.[3] So they may agree as to any way of dividing the losses, or even that one or more partners alone shall sustain them all, without loss to the

[1] In Smith *v.* Burnham, 3 Sumner, 435, it was held, by *Story*, J., that a partnership agreement to speculate in the purchase and sale of land, must, under the Statute of Frauds, be in writing. But *Ware*, J., *in re* Warren, Daveis, 320, held that a written agreement was necessary in such case only as between the partners themselves, while, as far as the rights of third persons were involved, such a partnership might be proved by parol. See Ralph *v.* Harvy, 1 Q. B. 845; Vice *v.* Anson, 7 B. & Cress. 409. And from the following language of *Ware*, J., in the case above cited: "If the partnership is by parol only, and one of the partners makes a purchase in his own name, but intended for the benefit of the firm, the other, on the mere ground of the partnership, that being by parol, cannot take advantage of the contract, for if he could, he would acquire an interest in land by parol, directly in opposition to the Statute of Frauds;" and from the recent case of Smith *v.* Tarlton, 2 Barb. Ch. 336, it seems that, if one purchases land in his own name, another cannot take advantage of it, solely on the ground of an oral agreement to make it a partnership transaction; but if, under such an agreement, the property is actually paid for out of the joint funds, a court of equity will decree an account, although the legal title is in one alone. See Henderson *v.* Hudson, 1 Munf. 510. See further, Dale *v.* Hamilton, 5 Hare, 369. The general principles of equity which are applied to the real estate of a partnership, will be considered hereafter. A partnership was entered into by a parol agreement, and was to continue three years. *Walworth*, Ch., held that this was not an agreement which was not to be performed within one year; so as to require it to be in writing, under the Statute of Frauds. Smith *v.* Tarlton, 2 Barb. Ch. 336.

[2] Battley *v.* Lewis, 1 Man. & Gran. 155. See Wilson *v.* Campbell, 5 Gilman, 383: Williams *v.* Jones, 5 B. & C. 108.

[3] Peacock *v.* Peacock, 16 Ves. 49; Farrar *v.* Beswick, 1 Mood. & Rob. 527; Gould *v.* Gould, 6 Wend. 263; Webster *v.* Bray, 7 Hare, 179, per *Wigram*, V. Ch.; Donelson *v.* Posey, 13 Ala. 752.

rest. And this agreement is valid as between themselves;[1] though not against third parties, unless they knew of this agreement between the partners, and gave credit accordingly. The rule seems to be that, if exemption from loss is claimed on account of any special limitation of the partners' authority to bind the firm, mere knowledge of such limitation will affect third parties.[2] But an agreement exempting partners from loss generally, or from loss beyond the amount invested, will only operate between the partners, unless it can be shown that the third party not only knew the agreement, but contracted with the firm on the basis of this agreement.[3] In general, each partner is absolutely responsible to every creditor of the copartnership, for the whole amount of the debt.[4] And if thereby obliged to suffer loss, his only remedy is against the other partners.

Although partners may agree and provide as they will in their articles, a long neglect of these provisions will be treated by a court of equity, and, perhaps, of law, as a mutual waiver of them.[5]

Persons may be partners as to third parties, or strangers, who are not partners *inter se*.[6] The latter question would generally be determined by the intention of the parties, as drawn from their contract — whether oral or written — under the ordinary rules of evidence and construction.[7] But whether one is liable as a partner to one who deals with the firm, must depend in part upon his intention, but more upon his acts; for, if by them he justifies those who deal with the firm in thinking him a partner in that business, he must bear the responsibility; as if he declare that he has a joint interest in the property, or conducts the busi-

[1] Hesketh *v.* Blanchard, 4 East, 144; Winship *v.* United States Bank, 5 Pet. 529; Pollard *v.* Stanton, 7 Ala. 761.

[2] Boardman *v.* Gore, 15 Mass. 336; Dow *v.* Sayward, 12 N. H. 271, 275; Ensign *v.* Wands, 1 Johns. Cas. 171; New York Fire Ins. Co. *v.* Bennett, 5 Conn. 579; Cargill *v.* Corby, 15 Miss. 425. See Galway *v.* Matthew, 1 Camp. 403.

[3] Danforth *v.* Allen, 8 Metc. 341, per *Wilde*, J.; King *v.* Dodd, 9 East, 516, 527; Saufley *v.* Howard, 7 Dana, 367, 370; Andrews *v.* Schott, 10 Penn. St. 47, 55. See Bailey *v.* Clark, 6 Pick. 372; Batty *v.* M'Cundie, 3 Car. & P. 202.

[4] Rice *v.* Shute, 5 Burr. 2611; Abbot *v.* Smith, 2 Wm. Bl. 947.

[5] England *v.* Curling, 8 Beav. 129; Jackson *v.* Sedgwick, 1 Swanst. 460; Const *v.* Harris, Turner & Rus. 496, 523; Boyd *v.* Mynatt, 4 Ala. 79; McGraw *v.* Pulling, 1 Freem. Ch. 357.

[6] Waugh *v.* Carver, 2 H. Bl. 235; Hazard *v.* Hazard, 1 Story, 371; Hesketh *v.* Blanchard, 4 East, 144; Gill *v.* Kuhn, 6 Serg. & Rawle, 333. See Griffith *v.* Buffum, 22 Vt. 181.

[7] Bird *v.* Hamilton, 1 Walk. Ch. (Mich.) 361; Goddard *v.* Pratt, 16 Pick. 412; Gill *v.* Kuhn, 6 Serg. & Rawle, 333.

ness of the firm as a partner, accepting bills, or the like.[1] The declarations or acts of one cannot, however, make another liable as partner.[2] The true rule, we think, (although it may not be quite settled,) is this, that one who thus holds himself out as a partner, when he really is not one, is responsible to a creditor who on these grounds believed him to be a partner; but not to one who knew nothing of the facts, or who, knowing them, knew also that this person was not a partner.[3]

A secret partner is one who is actually a partner by participation of profit, but is not avowed or known to be such;[4] and a dormant partner is one who takes no share in the conduct or control of the business of the firm.[5] Both of these are liable to creditors, even if they did not know them to be members of the firm, on the ground of their interest and participation in the profits, which constitute, with the property of the firm, the funds to which creditors may look for payment. A nominal partner is one who holds himself out to the world as such, but is not so in fact. He is liable to creditors of the firm, on the ground that he justifies them in trusting the firm on his credit, and, indeed, invites them to do so, by declaring himself to be a partner.

The principal test of membership in a mercantile firm is said to be the participation of profits. Thus, if one lend money to be used in a business, for which he is to receive a share in the profits, this would make him a partner; and if he is to receive lawful interest and, in addition thereto, a share of the profits, this would make him liable as a partner to a creditor, although the

[1] Fox *v.* Clifton, 6 Bing. 776, 794; Guidon *v.* Robson, 2 Camp. 302; Dickinson *v.* Valpy, 10 B. & Cress. 140; Stearns *v.* Haven, 14 Vt. 540; Gilpin *v.* Temple, 4 Harring. 190; Furber *v.* Carter, 11 Humph. 271.

[2] Whitney *v.* Ferris, 10 Johns. 66; McPherson *v.* Rathbone, 7 Wend. 216; Jennings *v.* Estes, 16 Maine, 323; Thornton *v.* Kerr, 6 Ala. 823; Tuttle *v.* Cooper, 5 Pick. 414; Anderson *v.* Levan, 1 Watts & Ser. 334; Taylor *v.* Henderson, 17 Ser. & Rawle, 453.

[3] In Young *v.* Axtell, cited 2 H. Bl. 242, Lord *Mansfield* is reported as saying: "As she suffered her name to be used in the business, and held herself out as partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." It now appears to be well settled that the holding out must be to the party himself, and credit given on the strength of it. Dickinson *v.* Valpy, 10 B. & Cress. 128, 140; Pott *v.* Eyton, 3 C. B. 32, 39; Markham *v.* Jones, 7 B. Mon. 456; Buckingham *v.* Burgess, 3 McLean, 364, 549. See Galway *v.* Matthews, 1 Camp. 403; Brown *v.* Leonard, 2 Chitty, 120.

[4] United States *v.* Binney, 5 Mason, 186, 5 Pet. 529.

[5] Mitchell *v.* Dall, 2 Harris & Gill, 159; Kelley *v.* Hurlburt, 5 Cow. 534; Desha *v.* Holland, 12 Ala. 513.

borrower might, perhaps, treat the transaction as an usurious loan, and on that ground defend himself if sued for the money.[1]

Sometimes a clerk, or salesman, or a person otherwise employed for the firm, receives a share of the profits instead of wages. Formerly it was held, but, as we think, on insufficient authority, that if such person received "one tenth part of the net annual profits," this made him a partner; but if he received "a salary equal in amount to one tenth of the net profits," this did not make him a partner. We apprehend, however, that now the courts would look more at the actual intention of the parties, and their actual ownership of an interest in the funds of the partnership, and not be governed by the mere phraseology used. If in fact he works for wages, although these wages are measured by the profits, he is no partner.[2]

Hence, factors and brokers for a commission on the profits,

[1] Grace *v.* Smith, 2 W. Bl. 999, and Bloxham *v.* Pell, cited; Morse *v.* Wilson, 4 T. R. 353; Gilpin *v.* Enderbey, 5 B. & Ald. 954; Oakley *v.* Aspinwall, 2 Sandf. Sup. Ct. R. 7; Bailey *v.* Clark, 6 Pick. 372; *Ex parte* Emma Briggs, 3 Dea. & Ch. 367.

[2] The earliest case on this point was Grace *v.* Smith, 2 W. Bl. 999; and to this case, as authority, the principle as stated has been referred. Here, Smith dissolved a partnership with Robinson, and agreed to lend the latter £4,000, for which he was to receive five per cent. interest, and an annuity of £300. Was Smith liable by reason of this contract, for goods sold to Robinson? The jury found that the annuity was not payable out of profits. *Held*, that he was not liable. *De Grey*, C. J., said: "The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes a part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment." From this it would be inferred that the court considered every person liable as a partner, who took a part of the partnership fund. But afterwards, in the same decision, *De Grey* says: "I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on these profits as a fund of payment. A distinction not more nice than usually occurs in questions of trade or usury." There is no higher authority, by decision, for the old rule above stated, than this case. Lord *Eldon*, in *Ex parte* Hamper, 17 Ves. 404, asserts that it is the rule, but appears to refer to Grace *v.* Smith as his authority. See *Ex parte* Langdale, 18 Ves. 300. We should prefer saying that the true criterion is, has the person sought to be charged as a partner, any interest in the profits while they remain a part of the undivided stock in trade? If so, he must sustain the liabilities of a partner. But if he has no interest in the profits, excepting that share which by his bargain comes to him, and no interest or property in this specific share, until it be severed by the partners for him, he is then no partner, but one who works for wages. Any one who wishes to pursue this question through the authorities, may refer for English cases, to Bloxham *v.* Pell, cited in Grace *v.* Smith, *supra;* Waugh *v.* Carver, 2 H. Bl. 235; Hesketh *v.* Blanchard, 4 East, 144; Wilkinson *v.* Frasier, 4 Esp. 182; Dry *v.* Boswell, 1 Camp. 329; Rowlandson, *ex parte*, 1 Rose, 90; Watson, *ex parte*, 19 Ves. 459; Mair *v.* Glennie, 4 M. & S. 240; Cheap *v.* Cramond, 4 B. & Ald. 663; Gilpin *v.* Enderbey, 5 B. & Ald. 954; Smith *v.* Watson, 2 B. & Cr. 401; Reid *v.* Hollingshead, 4 B. & Cr. 867; Bond *v.* Pittard, 3 M. & W. 357; Wilson *v.* Whitehead, 10 M. & W. 503; Rawlinson *v.* Clarke, 15 M. & W. 292; Pott *v.* Eyton, 3 C. B. 32; Barry *v.* Nesham, id 641; Stocker *v.* Brockelbank, 5 Eng. Law and Eq. 67. For American cases, see Loomis *v.* Marshall, 12 Conn. 69; Dunham *v.* Rogers, 1 Barr. 255; Burckle *v.* Eckhart, 3 Comst. 132, 1 Denio, 342; Cushman *v.* Bailey, 1 Hill, 526; Thorndike *v.* De Wolf, 6 Pick. 120; Jackson *v.* Robinson, 3 Mason, 138.

masters of vessels who engage for a share of the profits, seamen employed in whale ships, are none of them partners.

A partnership usually has but one business name; but there does not seem to be any legal objection to the use of two names, especially for distinct business transactions; as A B & Co. for general business, and the name of A B only for the purpose of making or indorsing negotiable paper.[1]

SECTION III.

HOW A PARTNERSHIP MAY BE DISSOLVED.

If the articles between the partners do not contain an agreement that the partnership shall continue for a specified time, it may be dissolved at the pleasure of either partner.[2] If there be such a provision, it should be regarded as binding; and it probably may be inferred from circumstances; but only from those of a very significant and decisive character.[3] If either partner were to undertake to assign his interest, for the purpose of withdrawing from the firm, against the will of the partners, without good reason, and in fraud of his express agreement, a court of equity might interfere.[4] For the assignment of a partner's interest, or

[1] South Carolina Bank *v.* Case, 8 B. & Cress. 427; Tams *v.* Hitner, 9 Penn. St. 441, 447; Kinsman *v.* Dallam, 5 Mon. 382; Palmer *v.* Stephens, 1 Denio, 471.

[2] It appears to be now clearly settled in England that a partnership for an indefinite period may be dissolved by any partner at a moment's notice. Peacock *v.* Peacock, 16 Ves. 49; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 308; Nerot *v.* Burnand, 4 Russ. 260; Heath *v.* Sansom, 4 B. & Ad. 175; Alcock *v.* Taylor, Tamlyn, 506. But in the well-considered case of Howell *v.* Harvey, 5 Pike, (Ark.) 270, it was held that the dissolution must be in good faith, and not at an unreasonable time. The duration may be gathered from the terms of the articles, although not expressly provided for. Potter *v.* Moses, 1 Rhode Island, 430; Wheeler *v.* Van Wart, 2 Jurist, 252.

[3] Crawshay *v.* Maule, 1 Swanst. 495, 508, 521. In this case, Lord *Eldon* said: "Without doubt, in the absence of express, there may be an implied contract, as to the duration of a partnership; but I must contradict all authority if I say that, wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that, if the partners purchase a fee-simple, there shall be a partnership forever."

[4] The question whether one partner may, by his own mere will, dissolve a partnership formed for a definite period, has elicited much discussion. It appears to have been assumed that there is no such power, in Peacock *v.* Peacock, 16 Ves. 56; Crawshay *v.* Maule, 1 Swanst. 495; Wheeler *v.* Van Wart, 2 Jurist, 252; Pearpoint *v.* Graham, 4 Wash. C. C. 232; but there are no express adjudications against it. In favor of this power are, the decision of the New York Court of Errors, in Marquand *v.* New York

of his share of the profits, operates at once a dissolution of the partnership.[1] Such assignment may transfer to the assignee the whole interest of the assignor, but cannot give him a right to become a member of the firm.[2] But there seems to be an exception to this rule where the partnership is very numerous, and the manner of holding shares, by scrip or otherwise, indicates the original intention of making the shares transferable.[3] Such a partnership is in effect a joint-stock company; which form of association is common in England, and there regulated by many statutes; but is not usual here, where incorporation is so easily obtained.

Death operates a dissolution;[4] and the personal representatives of the deceased do not take his place, unless there be in the articles an express provision that they shall.[5] And even such provisions have been construed as giving the heirs or personal representatives the right of electing whether to become partners or not.[6] If either party is unable to do his duty to the partnership, as by reason of insanity,[7] or a long imprisonment; or if he

Man. Co. 17 Johns. 525, and the following cases: Mason *v.* Connell, 1 Wharton, 388; Skinner *v.* Dayton, 19 Johns. 538; Whitton *v.* Smith, 1 Freem. Ch. (Miss.) 231. See Bishop *v.* Breckles, 1 Hoff. Ch. 534.

[1] Marquand *v.* New York Manuf. Co. 17 Johns. 525; Whitton *v.* Smith, 1 Freem. Ch. (Miss.) 231; Heath *v.* Sansom, 4 B. & Ad. 175; Cochran *v.* Perry, 8 Watts & Serg. 262; Horton's Appeal, 13 Penn. St. 67. But see Taft *v.* Buffum, 14 Pick. 322; Buford *v.* Neeley, 2 Dev. Eq. 481.

[2] Kingman *v.* Spurr, 7 Pick. 235; Nicoll *v.* Mumford, 4 Johns. Ch. 522.

[3] Fox *v.* Clifton, 9 Bing. 115, 119. If the articles designate a mode of transfer, it must be strictly followed. Kingman *v.* Spurr, 7 Pick. 235; Cochran *v.* Perry, 8 Watts & Serg. 262.

[4] Murray *v.* Mumford, 6 Cow. 441; Burwell *v.* Cawood, 2 How. 560; Knapp *v.* McBride, 7 Ala. 19. The dissolution operates as to all the survivors, however numerous may be the association; and even if the deceased were a silent partner. Washburn *v* Goodman, 17 Pick. 519. And though the partnership be for a term of years, yet unexpired, unless expressly provided otherwise. Gillespie *v.* Hamilton, 3 Madd. 251; Scholefield *v.* Eichelberger, 7 Pet. 586; Goodburn *v.* Stevens, 5 Gill, 1. Dissolution by death affects third parties, without notice of it. Vulliamy *v.* Noble, 3 Mer. 614; Webster *v.* Webster, 3 Swanst. 490, n. In Washburn *v.* Goodman, 17 Pick. 519, the estate of a deceased partner was held liable on bills drawn after his death; but there were other reasons than a want of notice.

[5] Pearce *v.* Chamberlain, 2 Ves. Sen. 33; Crawshay *v.* Maule, 1 Swanst. 495, 514, n., 520; Balmain *v.* Shore, 9 Ves. 500; Gratz *v.* Bayard, 11 Serg. & Rawle, 41.

[6] Pigott *v.* Bagley, McClell. & Younge, 569; Kershaw *v.* Matthews, 2 Russ. 62; Louisiana Bank *v.* Kenner's Succession, 1 Louis. 384; Downs *v.* Collins, 6 Hare, 418, 437. A partner may by will appropriate a part or the whole of his estate for the continuance of the partnership business after his death, and if his copartners consent to it, the business may continue, but no more of his estate will be bound for the partnership debts than he appropriates. Burwell *v.* Cawood, 2 How. 560; Pitkin *v.* Pitkin, 8 Conn. 325; *Ex parte* Garland, 10 Ves. 110; Thompson *v.* Andrews, 1 Mylne & K. 116.

[7] In England, lunacy does not operate *ipso facto* as a dissolution of the partnership. But a court of equity, on the finding of lunacy, either by inquisition or by inquiry under the direction of the court, will decree a dissolution. Milne *v.* Bartlett, 3 Jurist, 358

be guilty of material wrongdoing to the firm, a court of equity will decree a dissolution.[1] And if the original agreement were tainted with fraud, the court will declare it void, *ab initio*.[2]

Whenever a court of equity decrees a dissolution of the partnership, it will also decree that an account be taken between the partners, if requested by either partner. And if necessary to do justice, it will decree a sale of the effects and a distribution of the proceeds after a consideration of all the facts of the case and the whole condition of the firm. Such a decree will be made if a partner die, or become bankrupt.[3] If the whole interest of a copartner is levied upon and sold on execution, this makes a dissolution, and the purchaser becomes — like every other assignee of a partner — a tenant in common with the other partners; but if the levy and sale is only of a part which may be severed from the rest, this may not operate a dissolution except as to that part.[4]

If one partner retires, this operates in law a dissolution, although in fact the old firm frequently continues and goes on with its business, with or without new members, as if it were the same firm. The partner retiring should withdraw his name from the firm,[5] and give notice, by the usual public advertisement, of

Jones *v.* Noy, 2 Mylne & K. 125; Leaf *v.* Coles, 12 Eng. Law and Eq. 117. The dissolution does not take effect until the time of the decree. Besch *v.* Frolich, 7 Jurist, pt. 2, 73, 1 Phillips, Ch. 172. In this country, in Isler *v.* Baker, 6 Humph. 85, it was held that an inquisition of lunacy, found against a member of a partnership, *ipso facto* dissolved the partnership. Story on Partnership, § 295, and Davis *v.* Lane, 10 N. H. 161, per *Parker*, C. J., favor the same view. See Griswold *v.* Waddington, 15 Johns. 57.

[1] A court of equity will not decree a dissolution merely because partners are dissatisfied. Goodman *v.* Whitcomb, 1 Jac. & W. 589; Waters *v.* Taylor, 2 Ves. & B. 299, 15 Ves. 10; Henn *v.* Walsh, 2 Ed. Ch. 129; Walker *v.* Trott, 4 Ed. Ch. 38. But where the conduct of the partners makes it impossible for the business to be conducted according to the terms of the partnership, or with benefit to either party, a dissolution will be decreed. Smith *v.* Jeyes, 4 Beav. 503; Howell *v.* Harvey, 5 Pike, (Ark.) 278; Bishop *v.* Breckles, 1 Hoff. Ch. 534; Blake *v.* Dorgan, 1 Greene, (Iowa,) 537; Speights *v.* Peters, 9 Gill, 472; Gowan *v.* Jeffries, 2 Ash. 296.

[2] *Ex parte* Broome, 1 Rose, 69; Green *v.* Barrett, 1 Sim. 45, 50; Howell *v.* Harvey, 5 Pike, (Ark.) 270, 281; Hynes *v.* Stewart, 10 B. Mon. 429.

[3] After dissolution, any partner, or the executors or assignees of any partner, may, it seems, insist upon a sale of the partnership effects. Crawshay *v.* Collins, 15 Ves. 218; Rigden *v.* Pierce, 6 Madd. 353; Sigourney *v.* Munn, 7 Conn. 11; Evans *v.* Evans, 9 Paige, 178; Pierce *v.* Trigg, 10 Leigh, 406. Even though the articles determine the mode of distributing the stock, if they cannot be literally acted upon. Wilson *v.* Greenwood, 1 Swanst. 471; Cook *v.* Collingridge, Jac. 607. See Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Leach *v.* Leach, 18 Pick. 75, per *Wilde*, J.

[4] Waters *v.* Taylor, 2 Ves. & B. 299; Nicoll *v.* Mumford, 4 Johns. Ch. 525; Allen *v.* Wells, 22 Pick. 450.

[5] Dolman *v.* Orchard, 2 Car. & P. 104; Williams *v.* Keats, 2 Stark. 290; Brown *v.* Leonard, 2 Chitty, 120.

his retirement, and also, by personal notice, by letter or otherwise, to all who usually do business with the firm, and after such notice he is not responsible, even if his name be retained in the firm by the other partners, but without his consent.[1] Nor is he responsible to any one who has in any way actual knowledge of his retirement.[2] A dormant, or secret partner is not liable for a debt contracted after his retirement, although he give no notice; because his liability does not rest upon his giving his credit to the firm, but upon his being actually a partner.[3]

SECTION IV.

OF THE PROPERTY OF THE PARTNERSHIP.

A partnership may hold real estate, as well as personal estate. But the rules of law in respect to real estate, as in relation to title, conveyance, dower, inheritance, and the like, make some difference. As far, however, as is compatible with these rules, it seems to be agreed that the real estate of the partnership shall be treated as if it were personal property, if it have been purchased with the partnership funds, and for partnership purposes.[4]

[1] Newsome *v.* Coles, 2 Camp. 617; Jenkins *v.* Blizard, 1 Stark. 418.

[2] A notice, published for a reasonable length of time in the place or places where the firm transacts business, is sufficient for the public generally. Mowatt *v.* Howland, 3 Day, 353; Lansing *v.* Gaine, 2 Johns. 300; Shurlds *v.* Tilson, 2 McLean, 458; Watkinson *v.* Bank of Pennsylvania, 4 Whart. 482. See Brown *v.* Clark, 14 Penn. St. 469; Conro *v.* Port Henry Iron Co. 12 Barb. 56. But personal notice, by letter or otherwise, should be given to those who have had dealings with the firm. Prentiss *v.* Sinclair, 5 Vt. 149; Wardwell *v.* Haight, 2 Barb. 549; Hutchins *v.* Hudson, 8 Humph. 426; Vernon *v.* Manhattan Co. 17 Wend. 526. The mere taking of a newspaper in which such notice is published, is not sufficient. Watkinson *v.* Bank of Pennsylvania, 4 Whart. 482; Vernon *v.* Manhattan Co. 17 Wend. 526, 22 Wend. 192. As to what is sufficient dealing with a firm, to make actual knowledge of dissolution necessary, see Vernon *v.* Manhattan Co. *supra;* Hutchins *v.* Bank of Tenn. 8 Humph. 418.

[3] Grosvenor *v.* Lloyd, 1 Met. 19; Magill *v.* Merrie, 5 B. Monr. 168; Scott *v.* Colmesnil, 7 J. J. Marsh. 416.

[4] This doctrine is confined to courts of equity. The principle upon which it has been established is, that the legal estate, under the circumstances stated in the text, is clothed with a trust for the purposes of the partnership. The principle is well explained by *Shaw*, C. J., in Dyer *v.* Clark, 5 Metc. 562, 577. "It appears to us," said he, "that considering the nature of a partnership, and the mutual confidence in each other, which that relation implies, it is not putting a forced construction upon their act and intent, to hold that, when property is purchased in the name of the partners, out of partnership funds and for partnership use, though, by force of the common law, they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in

Thus, it does not go to the heirs of the partner or partners in whose name it may stand, but is first subject to the debts of the firm, and then to the balance which may be due to either partner on winding up their affairs.[1] But when these debts and claims are adjusted, any surplus of the real estate will go to the heir, and not to the personal representative of the deceased partner.[2]

that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration that the partners may have contributed to the capital stock in unequal proportions, or, indeed, that one may have advanced the whole. Take the case of a capitalist who is willing to put in money, but wishes to take no active concern in the conduct of business, and a man who has skill, capacity, integrity, and industry, to make him a most useful active partner, but without property, and they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock, and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm, as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? Suppose this trust is not implied, what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthier partner were to die. The legal estate descends to his heirs, clothed with no trust in favor of the surviving partner; the latter, without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion, and perhaps a large portion, of the fund bound for its payment, is withdrawn. Or, suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and subject to this, all those will take who are entitled to the property; namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner."

[1] Dyer *v.* Clark, *supra;* Goodburn *v.* Stevens, 5 Gill, 1; Howard *v.* Priest, 5 Met. 582; Burnside *v.* Merrick, 4 Met. 537; Buchan *v.* Sumner, 2 Barb. Ch. 165, 197; Hoxie *v.* Carr, 1 Sumn. 173; Brooke *v.* Washington, 8 Gratt. 248; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Sigourney *v.* Munn, 7 Conn. 11; Phillips *v.* Phillips, 1 My. & K. 663; Broom *v.* Broom, 3 My. & K. 443.

[2] Buckley *v.* Buckley, 11 Barb. 43; Goodburn *v.* Stevens, 5 Gill, 1; Buchan *v.* Sumner, 2 Barb. Ch. 165, 200. In this last case, *Walworth*, Ch., said: The American decisions in relation to real estate purchased with partnership funds, or [and ?] for the use of the firm, are various and conflicting. But I think they may generally be considered as establishing these two principles: 1. That such real estate is, in equity, chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another upon the winding up of the affairs of the firm. 2. That, as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate." But in England, the real estate of a copartnership is considered in equity as personal property, even as between the personal representative and the heir. See Phillips *v.* Phillips, 1 My. & K. 649; Broom *v.* Broom, 3 My. & K. 443; Morris *v.* Kearsley, 2 You. & Coll. 139.

Improvements made with partnership funds on the real estate of a partner, will be regarded as partnership property.[1] The widow has her dower only after the above-mentioned debts and claims are adjusted. And while the legal title is protected, as it must be for the purpose of conveyance and other similar purposes, the person holding this legal title will be held a trustee for the partnership, if that be entitled to the beneficiary interest.[2] But a purchaser of partnership real property, without notice or knowledge, from a partner holding the same by a legal title, is protected.[3] If, however, he has such knowledge, actually or constructively, the conveyance may be avoided as fraudulent, or he may be held as trustee, the land being in his hands chargeable with the debts and claims of the partnership.[4] A purchaser of partnership chattels is not protected.[5]

SECTION V.

OF THE AUTHORITY OF EACH PARTNER, AND THE JOINT LIABILITY OF THE PARTNERSHIP.

This authority is very great, because the law-merchant makes each partner an agent of the whole partnership, with full power to bind all its members and all its property, in transactions which fall within the usual business of the firm; as loans, borrowing, sales, pledges, mortgages, or assignments;[6] and this last, we think, extends even to an honest and prudent assignment of the

[1] Averill *v.* Loucks, 6 Barb. 19; Deming *v.* Colt, 3 Sandf. 284; King *v.* Wilcomb, 7 Barb. 263. See Frink *v.* Branch, 16 Conn. 260, 271.

[2] See *supra*, p. 172, n. 4.

[3] Hoxie *v.* Carr, 1 Sumner, 173; Kelley *v.* Greenleaf, 3 Story, 93; Buck *v.* Winn, 11 B. Mon. 320. See Kramer *v.* Arthurs, 7 Penn. St. 165. In Walsh *v.* Adams, 3 Denio, 125, it was held that this principle was confined to real estate, and that a purchaser of chattels belonging to a partnership, must take them subject to the partnership claims, whether he had notice that they belonged to the copartnership or not.

[4] See preceding note.

[5] Ibid.

[6] A partner may sell the whole stock at a single contract. Arnold *v.* Brown, 24 Pick. 89; Whitton *v.* Smith, 1 Freem. Ch. (Miss.) 231. See Pearpoint *v.* Graham, 4 Wash. C. C. 232; Livingston *v.* Roosevelt, 4 Johns. 277. For a partner's authority to pledge, see Reid *v.* Hollingshead, 4 B. & C 867; Metcalf *v.* Royal Ex. Ass. Co. Barnardiston, 343; *Ex parte* Gellar, 1 Rose, 297. For limitations to such authority, see *Ex parte* Copeland, 3 Dea. & Chit. 199; Snaith *v.* Burridge, 4 Taunt. 684. For authority to mortgage, see Milton *v.* Mosher, 7 Metc. 244; Tapley *v.* Butterfield, 1 Metc. 515.

whole stock and personal property to trustees to pay partnership debts.[1] So the making or indorsing negotiable paper.[2] So, in transactions out of the usual business of the firm, if they arose from and were fairly connected with that business.[3] Nor is any party dealing with him affected by his want of good faith towards the partnership, unless he colluded with the partner and participated in his want of good faith, by fraud or gross negligence. Thus, a holder of a note or bill signed or indorsed by a partner without authority, has no claim against the partnership if he knew or should have known the want of authority.[4] A partner cannot, in general, bind the firm by a guaranty, a letter

[1] Upon the question whether a partner may assign, without the consent of his copartners, the whole property of a firm for the benefit of its creditors, there is much conflict both in the dicta and in the reasons upon which the decisions have been rested; but it is believed that the following rules may be deduced from the adjudications, when considered with reference to the facts of the cases in which they were made. 1. A *bonâ fide* assignment directly to particular creditors, of a sufficient amount to discharge their debts, is valid, even if all the property of the firm be taken, and a preference be thereby given to such creditors. Tapley *v.* Butterfield, 1 Metc. 515; Mills *v.* Barber, 4 Day, 428; *Walworth*, Ch., in Havens *v.* Hussy, 5 Paige, 31. See Deming *v.* Colt, 3 Sandf. 284; Dana *v.* Lull, 17 Vt. 393, 394. 2. If necessary for the protection of creditors, an assignment of all the personal property to a trustee, for their benefit, by one partner, if his copartner is absent and cannot be consulted in season, and has, either expressly or by implication, left to him the sole management of the business, will be held valid. Anderson *v.* Tompkins, 1 Brock. 456; Robinson *v.* Crowder, 4 McCord, 519; Deckard *v.* Case, 5 Watts, 22; Harrison *v.* Sterry, 5 Cranch, 300. See dicta of *Felch*, J., in Kirby *v.* Ingersoll, 1 Doug. (Mich.) 490; and of *Oakley*, C. J., in Deming *v.* Colt, 3 Sandf. 292. See Hitchcock *v.* St. Johns, Hoff. Ch. 511, which appears to hold that such assignment must not prefer creditors. See also Dickinson *v.* Legare, 1 Dessau. 540. 3. A partner, if his copartner be engaged with him in managing the business of the firm, and is present, or can be seasonably consulted, cannot make a valid assignment of all the personal property of the firm to trustees, for the benefit of creditors, without the assent of his copartner. Deming *v.* Colt, 3 Sandf. 284; Havens *v.* Hussy, 5 Paige, 30; Kirby *v.* Ingersoll, 1 Doug. (Mich.) 477; Dana *v.* Lull, 17 Vt. 390. In Hughes *v.* Ellison, 5 Mis. 463, it does not appear whether the copartner was present or not. In Egberts *v.* Wood, 3 Paige, 517, 525, it was held that, after dissolution by the death of one partner, one of two surviving partners, without the assent of the other, could not assign the whole property of the firm for the benefit of preferred creditors. The real estate of a partnership cannot be conveyed by one partner alone. Anderson *v.* Tompkins, 1 Brock. 463; per *Shaw*, C. J., in Tapley *v.* Butterfield, 1 Metc. 518, 519.

[2] Pinkney *v.* Hall, 1 Salk. 126, 1 Ld. Raym. 175; Smith *v.* Baily, 11 Mod. 401. The presumption of law is, that a note, made by one partner in the name of the firm, was given in the regular course of partnership dealings, and hence is binding upon the firm. Doty *v.* Bates, 11 Johns. 544; M. and M. Bank *v.* Winship, 5 Pick. 11; Emerson *v.* Harmon, 14 Maine, 271. This authority to bind the firm by bills and notes is confined to partners in trade. Hedley *v.* Bainbridge, 3 Q. B. 316; Greenslade *v.* Dower, 7 B. & Cress. 635; Dickinson *v.* Valpy, 10 B. & C. 128.

[3] Sandilands *v.* Marsh, 2 B. & Ald. 673. See Livingston *v.* Roosevelt, 4 Johns. 251; Lea *v.* Guice, 13 Sm. & Marsh. 656.

[4] Blair *v.* Bromley, 5 Hare, 542; Brydges *v.* Branfill, 12 Simons, 369; Swan *v.* Steele, 7 East, 210; Livingston *v.* Roosevelt, 4 Johns. 251; Winship *v.* Bank of United States, 5 Pet. 529; Etheridge *v.* Binney, 9 Pick. 272; Locke *v.* Stearns, 1 Metc. 560.

of credit,[1] or a submission to arbitration,[2] without express, or a distinctly implied, authority.

By the earlier and more stringent rules of law, a partner could not bind his copartners by an instrument under seal, unless he was himself authorized under seal; and their subsequent acknowledgment of his authority did not cure the defect.[3] It seems now, however, to be the law of this country, that a partner may bind his firm by an instrument under seal, if it be in the name and for the use of the firm, and in the transaction of their usual business, provided the other copartners assent thereto before execution, or adopt and ratify the same afterwards; and they may assent or ratify by parol as well as by seal;[4] or provided he

[1] The law on the subject of guaranty by one partner in the name of the firm, is well expressed by *Metcalf*, J., in Sweetser *v.* French, 2 Cush. 309, 314: "Whatever the English law may formerly have been as to guaranties, we consider it now settled, in England as well as in the United States, that one partner cannot bind the firm by the guaranty of the debt of another, without a special authority for that purpose, or an authority to be implied from the common course of the business of the firm, or the previous course of dealing between the parties; unless the guaranty be afterwards adopted and acted upon by the firm." Such authority might be implied from the usage of others in a similar business. But such authority will not be implied from the fact that it was a reasonable mode of doing the partnership business. Brettel *v.* Williams, 4 Exch. 630. The general principle is sustained in Duncan *v.* Lowndes, 3 Camp. 478; Hasleham *v.* Young, 5 Q. B. 833; Foot *v.* Sabin, 19 Johns. 154; Rollins *v.* Stevens, 31 Maine, 454; Sutton *v.* Irwine, 12 Serg. & R. 13; Langan *v.* Hewett, 13 Sm. & Marsh. 122. The same principle applies to the making or indorsing of notes for accommodation, when not in the hands of a *bonâ fide* holder for value. Austin *v.* Vandermark, 4 Hill, 259; Wilson *v.* Williams, 14 Wend. 146; Beach *v.* State Bank, 2 Carter, (Ind.) 488.

[2] It is well settled in England that a partner cannot bind his copartner by a submission to arbitration. Adams *v.* Bankhart, 1 C. M. & Ros. 681; Stead *v.* Salt, 3 Bing. 101. The same principle is sustained in Hicks *v.* Foster, 13 Barb. 663; Buchanan *v.* Curry, 19 Johns. 137; Karthaus *v.* Ferrer, 1 Pet. 222, 228. In Southard *v.* Steele, 3 Mon. 435, and Taylor *v* Coryell, 12 Serg. & R. 243, it was held that such submission, when not under seal, would bind the firm. See Wilcox *v.* Singletary, Wright, (Ohio,) 420; Armstrong *v.* Robinson, 5 Gill & J. 412, 422; Skillings *v.* Coolidge, 14 Mass. 43, 45.

[3] But a partner might always, by deed, release a joint claim, and thereby bind his copartners. 2 Roll. Abr. 410, (D); Perry *v.* Jackson, 4 T. R. 519, per Lord *Kenyon;* Phillips *v.* Clagett, 11 M. & W. 84, 94, per *Parke*, B.; Pierson *v.* Hooker, 3 Johns. 68; Bruen *v.* Marquand, 17 Johns. 58; Morse *v.* Bellows, 7 N. H. 567; Emerson *v.* Knower, 8 Pick. 63.

[4] In the case of Gram *v.* Seton, 1 Hall, (N. Y.) 262, *Jones*, C. J., after a careful review of the authorities, said: "The previous authority or permission of one partner to another to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument as his deed; and that previous authority or subsequent adoption may be by parol." Three years later, (1831,) the Supreme Court of Massachusetts, on an independent investigation of the subject, arrived at the same conclusion. Cady *v.* Shepherd, 11 Pick. 400. These two decisions were followed in Bond *v.* Aitkin, 6 Watts & Serg. 165; Pike *v.* Bacon, 21 Maine, 280; Price *v.* Alexander, 2 Greene, (Iowa,) 427, 432; Swan *v.* Stedman, 4 Metc. 548; Smith *v.* Kerr, 3 Comst. 144, 150. But they were rejected in Turbeville *v.* Ryan, 1 Humph. 113; and some doubt may perhaps be thrown upon them, even in New York, by a recent and well-considered *dictum* of *Paige*, J., in delivering the judgment of the Court of Appeals, in Worrall *v.* Munn, 1 Selden, 240, in which he dissents from the principle as laid down above in Gram *v.* Seton, and confines the cases in which a parol authority or ratification is suffi-

would have made the same conveyance, or done the same act effectually without a deed.[1] And a deed executed by one partner in the presence and with the assent of the other partners, will bind them.[2]

Whether a majority of the members may conclusively bind the minority, may not be settled; but, upon the better authority and the better reason, we should say not, unless in reference to the internal concerns of the firm.[3] It seems to be settled that one member may, so far as he is concerned, arrest an inchoate negotiation, and prevent a bargain which would be binding on him, by giving notice to the third party of his dissent and refusal in season to enable him to decline the bargain without detriment.[4]

Partners must act *as such*, to bind each other. Thus, if a partner makes a note and signs it with his own and his partner's name, as a joint and several note, it does not bind his partner, for he had no authority to make such a note.[5]

If the name of one partner be also the name of the firm, it is not necessarily the name of the firm when used in a note or contract; and if the partner carries on mercantile business for himself, it is not *primâ facie* so.[6]

Persons may give a joint order for goods without becoming jointly liable, if it appear otherwise that credit was given to

cient, to that class in which the contract would have been valid if made without a seal. See 1 Parsons on Cont. 94, n. (f.) A partner cannot bind his copartners by a confession of judgment, unless brought into court by a regular service of process against him and his copartner. Crane *v.* French, 1 Wend. 312, 326; Bitzer *v.* Shunk, 1 Watts & Serg. 340; Barlow *v.* Reno, 1 Blackf. 252; Morgan *v.* Richardson, 16 Mis. 409. See Brutton *v.* Burton, 1 Chitty, 707.

[1] Tapley *v.* Butterfield, 1 Metc. 515; Anderson *v.* Tompkins, 1 Brock. 462; Lawrence *v.* Taylor, 5 Hill, 107; McCulloch *v.* Sommerville, 8 Leigh, 415. See Everit *v.* Strong, 5 Hill, 163.

[2] Lord Lovelace's case, Sir Wm. Jones, 268, cited in Ball *v.* Dunsterville, 4 T. R. 313; Mackay *v.* Bloodgood, 9 Johns. 285; Halsey *v.* Whitney, 4 Mason, 232; Pike *v.* Bacon, 21 Maine, 280; McArthur *v.* Ladd, 5 Ohio, 514; Fitchton *v.* Boyer, 5 Watts, 159; Henderson *v.* Barbee, 6 Blackf. 26.

[3] Const *v.* Harris, Turn. & Russ. 496, 517, 525, 527; Kirk *v.* Hodgson, 3 Johns. Ch. 400, 405; Robinson *v.* Thompson, 1 Vt. 465; Falkland *v.* Cheney, 5 Bro. P. C. 476; 1 Parsons on Cont. 168; 3 Kent's Comm. 45.

[4] Gallway *v.* Mathew, 10 East, 264; Wilson *v.* Dyson, 1 Stark. 164; Viel *v.* Flemming, 1 You. & Jerv. 227, 230; Leavitt *v.* Peck, 3 Conn. 124; Monroe *v.* Conner, 15 Maine, 178; Feigley *v.* Sponeberger, 5 Watts & Serg. 564. See Wilkins *v.* Pearce, 5 Denio, 541.

[5] Perring *v.* Hone, 2 Car. & P. 401, 4 Bing. 28.

[6] *Ex parte* Bolitho, Buck, 100; M. and M. Bank *v.* Winship, 5 Pick. 11; United States Bank *v.* Binney, 5 Mason, 176; Miner *v.* Downer, 19 Vt. 14. See Scott *v.* Colmesnil, 7 J. J. Marsh. 416. But if the partner whose name is used, be not shown to have done business on his private account, his name is presumed to be used for the firm. Trueman *v.* Loder, 11 Ad. & Ellis, 589; Bank of R. *v.* Monteath, 1 Denio, 402; Mifflin *v.* Smith, 17 Serg. & R. 165; S. C. Bank *v.* Case, 8 B. & C. 427.

them severally.[1] Nor will one have either the authority or the obligation of a partner cast upon him by an agreement of the firm to be governed by his advice.[2] Nor shall one be charged as partner with others, unless he has incurred the liability by his own voluntary act.[3]

The reception of a new member constitutes, in law, a new firm; but the new firm may recognize the old debts, as by express agreement, or paying interest, or other evidence of adoption, and then the new firm is jointly liable for the old debt. But there must be some fact from which the assent of the new member to this adoption of the old debt may be inferred, for his liability is not to be presumed.[4]

A notice in legal proceedings, abandonment to insurers by one who was insured for himself and others, a notice to quit of one of joint lessors who are partners in trade, notice to one partner of the dishonor of a note or bill bearing the name of the firm, a release to one partner, or by one partner, — will bind all the partners and render them jointly liable. But a service of process should be made upon each partner personally.[5]

If money be lent to a partner, for partnership purposes, it creates a partnership debt; but not if lent expressly on the individual credit of the person borrowing; and not if the borrowing partner receives it to enable him to pay his contribution to the capital of the firm.[6] Though the money be not used for the firm, if it was borrowed by one partner on the credit of the firm, in a manner and under circumstances justifying the lender in trusting to that credit, it creates a partnership debt.[7] And if a

[1] Gibson *v.* Lupton, 9 Bing. 297.

[2] Barklie *v.* Scott, 1 Hud. & Bro. 83.

[3] If a person's name be used in a firm without his consent, he is not thereby made liable as partner. Newsome *v.* Coles, 2 Camp. 617; Fox *v.* Clifton, 6 Bing. 776, 794. In Fay *v.* Noble, 7 Cush. 188, the parties, supposing they had organized as a corporation, appointed F. to act as agent for the corporation. It was found that the corporation was not legally organized from a failure to comply with the provisions of the charter. It was *held* that the shareholders were not liable as partners on contracts entered into by F. in behalf of the supposed corporation.

[4] Shirreff *v.* Wilks, 1 East, 48; Beale *v.* Mouls, 10 Q. B. 976; *Ex parte* Jackson, 1 Ves. Jr. 131; *Ex parte* Peele, 6 Ves. 602; Poindexter *v.* Waddy, 6 Munf. 418; Hart *v.* Tomlinson, 2 Vt. 101; Twyford *v.* Trail, 7 Sim. 92.

[5] Bignold *v.* Waterhouse, 1 M. & Sel. 259; Alderson *v.* Pope, 1 Camp. 404; Fitch *v.* Stamps, 6 How. (Miss.) 487; Barney *v.* Currier, 1 D. Chip. 315. But a service of process should be upon each partner personally. Demoss *v.* Brewster, 4 Sm. & Marsh. 661.

[6] Saville *v.* Robertson, 4 T. R. 720.

[7] The question in these cases is, with whom did the lender of the money make the contract, and to whom did he give the credit. If the facts of any case show that he,

partner uses funds in his hands as trustee, for partnership purposes, the firm are certainly jointly bound if it was done with their knowledge. Whether they will be bound if it was done without their knowledge, is perhaps doubtful.[1] Generally, where the partners are distinctly and directly benefited by a transaction, they will be deemed to have authorized it. Thus, if one partner purchases goods, and immediately they are used as the property of the firm, there would be a presumption that they were bought by him as a partner and for the firm.[2]

But the firm is liable only to one who deals with a partner in good faith. Thus, if one receives negotiable paper bearing their name, knowing that it is not in their business, and is given for

knowing the existence of the firm, gave the credit to the single partner, he can look to him only for payment, although the money may have been used for partnership purposes. Loyd *v.* Freshfield, 2 Car. & P. 325; Bevan *v.* Lewis, 1 Sim 376; Emly *v.* Lye, 15 East, 7; Jaques *v.* Marquand, 6 Cow. 497; Mead *v.* Tomlinson, 1 Day, 148, note; Le Roy *v.* Johnson, 2 Pet. 186, 198; Foley *v.* Robards, 3 Ired. 177; Green *v.* Tanner, 8 Metc. 411; Graeff *v.* Hitchman, 5 Watts, 454; Foster *v.* Hall, 4 Humph. 346; Cooke *v.* Seeley, 2 Exch. 746. On the other hand, if the partner held himself out as borrowing for the firm, and the lender, in the exercise of proper diligence and good faith, gave the credit to the firm, the firm will be liable, even if the money is fraudulently appropriated by the partner to his own use. Miller *v.* Manice, 6 Hill, 114; Church *v.* Sparrow, 5 Wend. 223; Whitaker *v.* Brown, 16 Wend. 505; Onondaga Co. Bank *v.* De Puy, 17 Wend. 47; Winship *v.* United States Bank, 5 Pet. 529; Dickson *v.* Alexander, 7 Ired. 4; Hamilton *v.* Summers, 12 B. Mon. 11. In the absence of other evidence showing to whom the credit was given, the fact that money lent to one partner was applied to the uses of the firm, will make the firm liable for its payment. Jaques *v.* Marquand, 6 Cow. 497; Walden *v.* Sherburne, 15 Johns. 409; Rothwell *v.* Humphreys, 1 Esp. 406. But the fact that the partner applied it to increase the capital of the firm, would not have that effect. Fisher *v.* Taylor, 2 Hare, 218, 229.

[1] *Ex parte* Watson, 2 Ves. & Bea. 414; Hutchinson *v.* Smith, 7 Paige, 26, 32. If the trustee, with the consent of the *cestui que trust*, apply the funds to partnership purposes, and the *cestui que trust* honestly gives credit to the partnership, and takes partnership security, the firm is liable, even if the money is applied and the security given by the trustee without the consent of his copartners, for the transaction is substantially a loan from the *cestui que trust* to a single partner, for the uses of the firm, and on the credit of the firm. Richardson *v.* French, 4 Metc. 577; Whitaker *v.* Brown, 16 Wend. 505. If the fund is applied without the knowledge either of the *cestui que trust* or of the copartners, it is clear that the trustee is not discharged. Jaques *v.* Marquand, 6 Cow. 497; Hutchinson *v.* Smith, 7 Paige, 26, 33, per *Walworth*, Ch. And it has been *held* that the copartners would not be liable to the *cestui que trust*. *Ex parte* Aspey, 3 Bro. C. C. 265; Jaques *v.* Marquand, *supra*. But see Hutchinson *v.* Smith, *supra*.

[2] Gardiner *v.* Childs, 8 Car. & Payne, 345. And see *supra*, p. 178, n. 7. If a purchaser of goods have a dormant partner, the vendor may look to both for payment, if the goods were used for partnership purposes, even if credit, at the time of the sale, were exclusively given to the ostensible partner. Schermerhorn *v.* Loines, 7 Johns. 311; Reynolds *v.* Cleveland, 4 Cow. 282; Griffith *v.* Buffum, 22 Vt. 181; Bisel *v.* Hobbs, 6 Blackf. 479. A dormant partner may be joined, in an action upon an express contract, entered into by the ostensible partners, in their own names only. Beckham *v.* Drake, 8 Mee. & W. 846. But see Beckham *v.* Knight, 4 Bing. N. C. 243. But if the partners are all known to the vendor, and he elects to trust to the credit of a single partner, and makes the contract with him, he cannot hold the other partners liable, although the goods may be used for the firm. Sylvester *v.* Smith, 9 Mass. 119; Ketchum *v.* Durkee, Hoff. Ch. 538; Griffith *v.* Buffum, 22 Vt. 181, 184, per *Hall*, J.

no consideration as to them, he cannot hold them. And if a creditor of one partner receive for his separate debt a partnership security, this we should hold to be a fraud, unless the creditor could show that the partner had, or was supposed by him to have, the authority of the rest.[1] And if the partnership security be transferred for two considerations, one of which is private and fraudulent, and the other is joint and honest, it seems to be held that the partnership is bound for so much of it as is not tainted with fraud.[2]

The partnership may be liable for injury caused by the criminal or wrongful acts of a partner, if these were done in the transaction of partnership business, and if it was the partnership which gave to the wrongdoer the means and opportunity of doing the wrong.[3] But an illegal contract will not bind the copartners, for the parties entering into it must be presumed to know its illegality.[4]

Whether the acknowledgment of one who had been a partner, after the dissolution of the partnership, can take the debt out of the statute of limitations, so as to restore the liability of all the partners, has been much agitated. We consider, however, that it is now quite well settled in this country that it can have no such effect; on the ground that he has no longer the right or power to make a new promise for his former partners; and it is only as a new promise that an acknowledgment is a bar to the statute of limitations.[5]

[1] Shirreff *v.* Wilks, 1 East, 48; Hope *v.* Cust, cited in Shireff *v.* Wilks, *supra;* Green *v.* Deakin, 2 Stark. 347; Arden *v.* Sharpe, 2 Esp. 524; Chazournes *v.* Edwards, 3 Pick. 5; Davenport *v.* Runlett, 3 N. H. 386; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Gansevoort *v.* Williams, 14 Wend. 133; Clay *v.* Cottrell, 18 Penn. St. 408; Taylor *v.* Hillyer, 3 Blackf. 433; Rogers *v.* Batchelor, 12 Pet. 221. An express or implied authority from the partners will make the security binding upon them. Gansevoort *v.* Williams, 14 Wend. 133; Noble *v.* M'Clintock, 2 Watts & Serg. 152; Darling *v.* March, 22 Maine, 184. But the creditor, taking the security, must show this authority. Davenport *v.* Runlett, 3 N. H. 386; and cases cited *supra.*

[2] Wilson *v.* Lewis, 2 Man. & Gran. 197; Barker *v.* Burgess, 3 Metc. 273.

[3] Hawkins *v.* Appleby, 2 Sandf. 421; Locke *v.* Stearns, 1 Metc. 560; Rapp *v.* Latham, 2 B. & Ald. 795; Willett *v.* Chambers, Cowper, 814; Edmonson *v.* Davis, 4 Esp. 14; Moreton *v.* Hardern, 4 B. & C. 223; Blair *v.* Broomley, 5 Hare, 542, 558. A contract entered into by a partner, in fraud of his copartners, if in the regular course of the firm business, will bind them, unless the third party were in some way implicated either by actual fraud or neglect. Bond *v.* Gibson, 1 Camp. 185; Boardman *v.* Gore, 15 Mass. 331; Beach *v.* State Bank, 2 Carter, (Ind.) 488.

[4] Hutchins *v.* Turner, 8 Humph. 415.

[5] Bell *v.* Morrison, 1 Pet. 351; Van Keuren *v.* Parmelee, 2 Comst. 523; Shoemaker *v.* Benedict, 1 Kern. 176; Exeter Bank *v.* Sullivan, 6 N. H. 124; Kelley *v.* Sanborn, 9 id. 46; Whipple *v.* Stevens, 2 Fost. 219; Belote *v.* Wynne, 7 Yerg. 534; Muse *v.* Donalson, 2 Humph. 166. See further upon this question, 2 Parsons on Cont. 359, *et seq.*

SECTION VI.

REMEDIES OF PARTNERS AGAINST EACH OTHER.

It is seldom that a partner can have a claim against another partner, *as such*, which can be examined and adjusted without an investigation into the accounts of the partnership, and, perhaps, a settlement of them. Courts of law have ordinarily no adequate means for doing this; and therefore it is generally true that no partner can sue a copartner at law for any claim growing out of partnership transactions and involving partnership interests.[1] But the objection to a suit at law between partners goes no further than the reason of it; and, therefore, one may sue his copartner upon his agreement to do any act which is not so far a partnership matter as to involve the partnership accounts. Or if the accounts are finally adjusted, either partner may sue for a balance;[2] and so it would be if the accounts generally remained open, but a specific part of them were severed from the rest, and a balance found on that.[3] The rule is generally laid down that an action cannot be sustained for a balance unless there is an express promise to pay it. But such promise would, we think, be inferred in all cases in which an account had been taken, and a balance admitted to be due.[4]

What a court of law cannot do, however, in this respect, a court of equity can; and, generally, equity has a full jurisdiction over all disputes and claims between partners, and may do whatever is necessary to settle them in conformity with justice.

[1] Bovill *v.* Hammond, 6 B. & C. 149; Fromont *v.* Coupland, 2 Bing. 170; Brown *v.* Tapscott, 6 M. & W. 119; Casey *v.* Brush, 2 Caines, 293; Pattison *v.* Blanchard, 6 Barb. 537; Haskell *v.* Adams, 7 Pick. 59; Beach *v.* Hotchkiss, 2 Conn. 425. The action of account may be brought by one partner against another where that action is in use. Kelly *v.* Kelly, 3 Barb. 419; Beach *v.* Hotchkiss, 2 Conn. 425.

[2] Wray *v.* Milestone, 5 M. & W. 21; Wetmore *v.* Baker, 9 Johns. 307; Lamalere *v.* Caze, 1 Wash. C. C. 435; Williams *v.* Henshaw, 11 Pick. 82; Clark *v.* Dibble, 16 Wend. 601.

[3] Gibson *v.* Moore, 6 N. H. 547; Coffee *v.* Brian, 3 Bing. 54; Jackson *v.* Stopherd, 4 Tyrw. 330; Coll. on Partnership, (Perk. ed.) § 272.

[4] Pattison *v.* Blanchard, 6 Barb. 537; Casey *v.* Brush, 2 Caines, 293; Killam *v.* Preston, 4 Watts & Serg. 14; Wray *v.* Milestone, 5 M. & W. 21. In Massachusetts, an action can be sustained in all cases in which the rendition of judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them. Williams *v.* Henshaw, 11 Pick. 79; Rockwell *v.* Wilder, 4 Metc. 556, 561; Dickinson *v.* Granger, 18 Pick. 315.

Whether equity will decree an account without decreeing dissolution, may not be quite settled; because, in the great majority of cases, these ought to go together. But we think that an account would be decreed, and a balance struck, without a decree of dissolution, if the circumstances were such as made this last unnecessary or inequitable.[1]

A partner may sue his copartner for money advanced before the partnership was formed, although the loan was made to promote the partnership.[2] And he may sue those who were then members, for work done for the firm before he became a member of it.[3] And he may sue a copartner on his note or bill, although the consideration was on partnership account;[4] but, in general,

[1] This question has been much discussed, and the decisions are conflicting. In Loscombe *v.* Russell, 4 Sim. 8, it was held that a bill praying for an account, but not asking for a dissolution, was bad on demurrer. But the following extracts, from recent decisions, show that the rule stated in the text, is at present accepted in England. In Richardson *v.* Hastings, 7 Beav. 301, 307, Lord *Langdale*, Master of the Rolls, said: "At one time, the court would not entertain a suit between parties in relation to partnership transactions, except upon a bill to wind up the partnership. That is not now the rule of the court; for I think, and the cases which have been referred to corroborate that view, that the court will, as between partners, entertain a bill to settle a question which may arise between them, without proceeding to wind up the concerns and affairs of the partnership." The same year, (1844,) *Wigram*, V. Ch., in Fairthorne *v.* Weston, 3 Hare, 387, said: "The argument for the defendant turned wholly upon the proposition, that a bill praying a particular account, is demurrable, unless the bill seeks and prays a dissolution of the partnership; in support of which the case of Loscombe *v.* Russell, 4 Sim. 8, and the cases there cited were relied upon. That there may be cases to which the rule there laid down is applicable, I am not prepared to deny; but the law as laid down in that case was never admitted to be a rule of universal application. Harrison *v.* Armitage, 4 Madd. 143; Richards *v.* Davies, 2 Russ. & Myl. 347. And the unequivocal expressions of the opinion of Lord Cottenham, in Taylor *v.* Davies, 4 Law J. Rep. N. S. Chan. 18, and Walworth *v.* Holt, 4 My. & Cr. 619; of the Vice-Chancellor of England, in Miles *v.* Thomas, 9 Sim. 609; and of Lord Langdale, in Richardson *v.* Hastings, *supra*, shows that there is no such universal rule at the present day; and I cannot but add that it is essential to justice that no such universal rule should be sustained. If that were the rule of the court, — if a bill in no case would lie to compel a man to observe the covenants of a partnership deed, — it is obvious that a person fraudulently inclined might, of his mere will and pleasure, compel his copartner to submit to the alternative of dissolving partnership, or ruin him by a continued violation of the partnership contract."

[2] One partner may bring an action against his copartner for money advanced to make up his capital. Venning *v.* Leckie, 13 East, 7; Elgie *v.* Webster, 5 M. & W. 518; Bumpass *v.* Webb, 1 Stewart, (Ala.) 19. So, a partner may bring an action against his copartner for not contributing his share of the capital. Gale *v.* Leckie, 2 Starkie, 107; Townsend *v.* Goewey, 19 Wend. 424; Ellison *v.* Chapman, 7 Blackf. 224. Where one partner fraudulently gave the note of the firm for his private debt, and his copartner was obliged to pay it, it was *held* that the latter might recover for money paid to the use of the former. Cross *v.* Cheshire, 6 Eng. Law & Eq. 517. See Smith *v.* Barrow, 2 T. R. 476.

[3] Lucas *v.* Beach, 1 Man. & Gr. 417.

[4] Van Ness *v.* Forrest, 8 Cranch, 30; Gridley *v.* Dole, 4 Comst. 486; Rockwell *v.* Wilder, 4 Mete. 556; Bonnaffe *v.* Fenner, 6 Sm. & Marsh. 212; Grigsby *v.* Nance, 3 Ala. 347. In Gridley *v.* Dole, 4 Comst. 486, 492, the action was brought on a promissory note given by one partner for money advanced by his copartner to pay partnership debts. *Gardiner*, J., in delivering the opinion of the court, said: "It is true, if the

no action can be maintained for work and labor performed, or money expended for the partnership.[1]

It is now quite certain that a partner who pays more than his proportion of a debt of the partnership, cannot demand specific contribution from his copartners, but must charge his payment to the firm.[2]

If one of a firm be a member also of another firm, the one firm cannot sue the other; for the same person cannot be plaintiff and defendant of record.[3] And although the fraud of a copartner,

plaintiff had paid demands against the firm of which he and the maker of the note were members, he could not have recovered at law against his copartner, for he must then sue upon an implied promise, and until an account of the copartnership was taken, it could not be ascertained whether the plaintiff had or had not paid more than his proportion. (Coll. on Partnership, Perkins's ed. § 264, 19 Wend. 424.) But the plaintiff, although liable to the creditors of the firm, was under no legal or moral obligation to advance money to his former partner. He owed him nothing. He had, therefore, a right to prescribe the conditions upon which he would part with the money, and to exact and enforce the securities given as the means of obtaining it. The authorities are full to this point. If one partner gives the other his promissory note, or a separate acceptance for value received, on the partnership account, an action will lie on such note or bill."

[1] The reasons which prevent a partner from recovering for money advanced, or for services rendered for the benefit of the firm, are, first, that it would be necessary to bring the action against the firm of which he is a member, and a man cannot be both plaintiff and defendant in the same suit; second, that it cannot be determined until the accounts are settled that he has contributed more than his share of either money or service, or that he is entitled to any thing as against the creditors of the firm. Richardson *v.* Bank of England, 4 Myl. & Cr. 165; Caldwell *v.* Leiber, 7 Paige, 483; Holmes *v.* Higgins, 1 B. & Cress. 74; Goddard *v.* Hodges, 3 Tyrw. 209; Savage *v.* Carter, 9 Dana, 408; Bevans *v.* Sullivan, 4 Gill, 383; Reybold *v.* Jefferson, 1 Harrington, 401; Causten *v.* Burke, 2 H. & Gill, 295. But if a partner advances money or performs services in a case in which he is under no legal obligation to do so, and, under an express contract with his copartners, he may recover from them, although the money was advanced, or the services were rendered for the benefit of the copartnership. Paine *v.* Thacher, 25 Wend. 450; Bradford *v.* Kimberly, 3 Johns. Ch. 431; Lewis *v.* Moffett, 11 Ill. 392. Partners are not, unless by special agreement, entitled to interest on capital advanced. Desha *v.* Smith, 20 Ala. 747; Jones *v.* Jones, 1 Ired. Eq. 332. But such agreement will sometimes be presumed from circumstances. Millar *v.* Craig, 6 Beavan, 433.

[2] Sadler *v.* Nixon, 5 B. & Adol. 936; Haskell *v.* Adams, 7 Pick. 59; Lawrence *v.* Clark, 9 Dana, 257; Roberts *v.* Fitler, 13 Penn. St. 265.

[3] Bosanquet *v.* Wray, 6 Taunt. 597; Portland Bank *v.* Hyde, 2 Fairf. 196; Eastman *v.* Wright, 6 Pick. 320; Mainwaring *v.* Newman, 2 Bos. & Pull. 120, 124, n.; Burley *v.* Harris, 8 N. H. 235; Pennock *v.* Swayne, 6 Watts & Serg. 239, 465. There is the same objection to contracts between a firm and any member of it. Hill *v.* McPherson, 15 Miss. 204. In Decreet *v.* Burt, 7 Cush. 551, it was held that the holder of a promissory note, being a member of a firm, who are the first indorsers thereon, cannot maintain an action on the note against a subsequent indorser. The difficulty is not removed by the decease of the partner who belongs to both firms, if the contract sued upon was made during his life. In Bosanquet *v.* Wray, *supra*, the court said: "The transactions originated during the life of the late Mr. B., who was a partner in both houses. It is clear that no part of the demand, which accrued to the London house upon transactions which took place during the lifetime of B., and to which therefore he was a party, could ever, either during his life or since his decease, be recovered at law; on this ground, that no legal contract could subsist between him and those connected with him, on the one side, and himself and those connected with him, on the other side; the parties could only so far enter into this contract as to render it available in

as in negotiating a note, or in any similar transaction, if brought home to the party dealing with him, constitutes a good defence for the firm, they cannot institute an action founded upon the fraud, as, for instance, to recover property or documents fraudulently passed away, because the fraudulent copartner would have to be co-plaintiff of record.[1] In all these cases an adequate remedy may be found in equity.

The partners are entitled to perfect good faith from each copartner; and equity will interfere to enforce this. No partner will be permitted to treat privately, and for his own benefit alone, for a renewal of a lease,[2] or to transfer to himself any benefit or interest properly belonging to the firm. And so careful is equity in this respect, that it will not permit a copartner, by his private contract or arrangement, to subject himself to a bias or interest which might be injurious to the firm, and conflict with his duty to them.[3]

SECTION VII.

RIGHTS OF THE FIRM AGAINST THIRD PARTIES.

The principles of agency apply to cases of partnership so far that, if one borrows money of a person who is a copartner, and who lends the money of his firm, either this copartner or the firm may bring an action for it, although the borrower did not know that they lent it; the firm standing in the relation of an undisclosed principal.[4] So, if a copartner sells the goods of the firm in his own name, they may sue for the price.[5] But the rights of one who deals in good faith with a copartner as with him alone,

equity; and as this principle goes to the root of the contract, the same objections to the plaintiff's recovery still continue after his decease." See Parker *v.* Macomber, 18 Pick. 509.

[1] Jones *v.* Yates, 9 Barn. & Cress. 532; Greeley *v.* Wyeth, 10 N. H. 15. In Pennsylvania, the firm can sue in such a case. Purdy *v.* Powers, 6 Penn. St. 492. A firm cannot bring an action upon an illegal contract entered into by one partner. Biggs *v.* Lawrence, 3 T. R. 454.

[2] Alder *v.* Fouracre, 3 Swanst. 489; Fawcett *v.* Whitehouse, 1 Russell & Mylne, 132; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Leach *v.* Leach, 18 Pick. 68.

[3] Burton *v.* Wookey, 6 Madd. 367; Long *v.* Majestre, 1 Johns. Ch. 305; Russell *v.* Austwick, 1 Sim. 52; Maddeford *v.* Austwick, 1 Sim. 89; Kelley *v.* Greenleaf, 3 Story, 93, 101; Glassington *v.* Thwaites, 1 Sim. & St. 133; Ogden *v.* Astor, 4 Sandf. 311.

[4] Alexander *v.* Barker, 2 Cr. & Jer. 133.

[5] Cothay *v.* Fennell, 10 B. & Cress. 671; Skinner *v.* Stocks, 4 B. & Ald. 437; Ward *v.* Leviston, 7 Blackf. 466; Hilliker *v.* Loop, 5 Vt. 116.

are so far regarded that he may set off any claim or make use of any other equities against the suit of the firm, which he could have made had the person with whom he dealt sued alone.[1] A guaranty to a copartner, if for the use and benefit of the firm, gives to them a right of action.[2]

It would seem that a new firm, created by some change in the membership of an old firm, is entitled to the benefit of a guaranty given to the old firm, even if sealed, provided it shall appear that the instrument was intended to have that effect.[3]

SECTION VIII.

RIGHTS OF CREDITORS IN RESPECT TO FUNDS.

The property of a partnership is bound to pay the partnership debts; and, therefore, a creditor of one copartner has no claim to the partnership funds until the partnership debts are paid.[4] If

[1] Ward *v.* Leviston, 7 Blackf. 466; Hilliker *v.* Loop, 5 Vt. 116; Lord *v.* Baldwin, 6 Pick. 352; George *v.* Clagett, 7 T. R. 359, n.

[2] Garrett *v.* Handley, 4 Barn. & Cress. 664; Walton *v.* Dodson, 3 Carr. & Payne, 162.

[3] In the absence of evidence of any such intention, it is well settled that the new firm is not entitled to the benefit of a guaranty given to the old one. Bellairs *v.* Ebsworth, 3 Camp. 52; Weston *v.* Barton, 4 Taunt. 673; Simson *v.* Cooke, 8 Moore, 588; Penoyer *v.* Watson, 16 Johns. 100; Myers *v.* Edge, 7 T. R. 254; Wright *v.* Russell, 3 Wilson, 530; Dry *v.* Davy, 2 Perry & Dav. 249; N. H. C. Bank *v.* Mitchell, 15 Conn. 206; 1 Parsons on Cont. 505. In Weston *v.* Burton, *supra*, *Mansfield*, C. J., in commenting upon cases of this class, said: "It is not now necessary to enter into the reasons of those decisions, but there may be very good reasons for such a construction; it is very probable that sureties may be induced to enter into such security by the confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things, there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be that the partner dying or going out may be the very person upon whom the sureties relied; it would, therefore, be very unreasonable to hold the surety to his contract after such change." But this is a question of construction only, and if it appear, from the terms of the instrument construed in the light of the circumstances under which it was made, that it was intended to extend beyond the old firm, the courts will give it that effect. Barclay *v.* Lucas, 3 Doug. 321, n.; Metcalf *v.* Bruin, 12 East, 405; Pease *v.* Hirst, 10 Barn. & Cress. 122. As regards this question, it makes no difference whether the guaranty be under seal or not, for the question is not, in whose name shall the action be brought, but for whose benefit. Pease *v.* Hirst, 10 B. & Cr. 122.

[4] It is clearly settled that the creditors of a firm have a claim, prior to that of the separate creditors of each partner, upon the assets of the firm. Murrill *v.* Neill, 8 How. U. S. 414; Bell *v.* Newman, 5 Serg. & R. 78; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Pierce *v.* Jackson, 6 Mass. 242; Tappan *v.* Blaisdell, 5 N. H. 190; In the matter of Smith, 16 Johns. 102; Commercial Bank *v.* Wilkins, 9 Greenl. 28; Pearson *v.* Keedy, 6 B. Mon. 128; Clark *v.* Allee, 3 Harrington, 80; Allen *v.* Center Valley Co. 21 Conn. 130. The nature of this claim has given rise to some discussion and diversity of opinion. There are decisions which appear to give the joint creditors an

there be then a surplus, he may have the copartners' interest therein, in payment of his private debt. If a private creditor attaches partnership property, or in any way seeks to appropriate it to his private debt, the partnership debts being unpaid, he cannot hold it, either at law or in equity. Such attachment or appropriation being wholly subject to the paramount claims of the partnership creditors, it is wholly defeated by the insolvency of the partnership, although the partnership creditors have not brought any actions for their debts.[1] It seems, however, that if

equitable lien upon the property of the firm, so that any appropriation of it by the partners, in payment of separate debts, in a case of insolvency, would be set aside as fraudulent. Jackson *v.* Cornell, 1 Sandf. Ch. 348; Burtus *v.* Tisdale, 4 Barb. 571, 590. See Ferson *v.* Monroe, 1 Fost. 462. In 3 Kent's Com. 64, it is said: "The basis of the general rule is, that the funds are to be liable on which the credit was given. In contracts with a partnership, the credit is supposed to be given to the firm, but those who deal with an individual member, rely on his sufficiency." But the view presented by *Tilghman*, C. J., in Bell *v.* Newman, 5 Serg. & R. 78, and cited with approbation by *Lumpkin*, J., in Cleghorn *v.* Ins. Bank of Columbus, 9 Geo. 324, appears to be more tenable. "The truth is, that persons who trust the partners, either in their separate or partnership character, generally do it on the credit of their whole estate, both joint and separate. When men enter into partnership, they often borrow money on their private accounts for the very purpose of creating partnership stock; and this they may continue to do during the partnership. And on the other hand, the individuals of a partnership often withdraw money from the joint stock and convert it to separate property, in such a manner that it cannot be traced or identified." The prevailing opinion seems to be that this claim of the partnership creditors springs out of the lien, or *quasi* lien, which each partner has upon the whole property of the firm for his own security, and that it must be worked out through that lien. The law is well stated by *Walworth*, Ch., in Kirby *v.* Schoonmaker, 3 Barb. Ch. 46, 49: "Where a partnership is dissolved by the death of one of the copartners, or where one or both of the copartners becomes bankrupt, or they are discharged under the insolvent acts, so that their property is placed in the hands of the assignees appointed by law to make distribution thereof, it is administered in courts of equity, by applying the copartnership funds, in the first place, to the payment of the debts of the firm. . . . But where the copartners are administering their own funds, the copartnership creditors have no lien upon the joint funds. . . . I do not understand this rule to go so far as to deprive the partners themselves of the power, while they have the legal control of their property, of distributing it among all their creditors in such manner as they see fit; provided no actual injustice is done to any of the creditors. . . . Again, the copartners may assign their individual property to pay the joint debts of the firm, thereby giving the creditors of the firm a preference in payment out of the separate estate of the assignors, over the separate creditors. And I see no good reason why each copartner, with the assent of the others, should not have the corresponding right to give his individual creditors a preference in payment out of the share of the effects of the firm which, as between him and his copartners, and without reference to the debts for which they are all jointly liable, is legally his own property." And see *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3; Allen *v.* Center Valley Co. 21 Conn. 130; Greenwood *v.* Brodhead, 8 Barb. 593; Robb *v.* Stevens, 1 Clarke's Ch. 191; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Clement *v.* Foster, 3 Ired. Eq. 213; Pearson *v.* Keedy, 6 B. Mon. 128; M'Donald *v.* Beach, 2 Blackf. 55; Snodgrass's Appeal, 13 Penn. St. 471; United States *v.* Duncan, 12 Ill. 523. In Rice *v.* Barnard, 20 Vt. 479, it was held that, where the partnership was of such a nature that the copartners had no lien, the joint creditors had no preference. But see Ferson *v.* Monroe, 1 Fost. 462.

[1] Pierce *v.* Jackson, 6 Mass. 242; Dunham *v.* Murdock, 2 Wend. 553; Phillips *v.* Bridge, 11 Mass. 249; Commercial Bank *v.* Wilkins, 9 Greenl. 28; In the matter of Smith, 16 Johns. 102; Douglas *v.* Winslow, 20 Maine, 89; Tappan *v.* Blaisdell, 5 N. H. 190; Brewster *v.* Hammet, 4 Conn. 540; Robbins *v.* Cooper, 6 Johns. Ch. 186;

one partner is dormant and unknown, the creditor of the other attaching the stock, is not postponed to the creditor who discovers the dormant partner and sues him with the other; unless, perhaps, the first attaching creditor's claim has no reference to the partnership business, and that of the second attaching creditor has this reference.[1]

Whether the converse of this rule is true, and the partnership creditors are restrained from appropriating the private property of the copartners until the claims of their private creditors are satisfied, is not, perhaps, entirely settled. Such is certainly the rule in equity, according to the weight of authority.[2] And al-

Clark *v.* Allee, 3 Harrington, 80. In Vermont, joint creditors have no preference at law. Reed *v.* Shepardson, 2 Vt. 120.

[1] Lord *v.* Baldwin, 6 Pick. 348; Van Valen *v.* Russell, 13 Barb. 590; French *v.* Chase, 6 Greenl. 166; Cammack *v.* Johnson, 1 Green, Ch. 163. The distinction taken in the text between a claim having reference to the business with which the dormant partner is connected, and one not so connected, was relied on in Witter *v.* Richards, 10 Conn. 37; and it was held that the former is entitled to priority, while the latter is not. But this distinction was not recognized in the late case of Brown's Appeal, 17 Penn. St. 480, although the case of Witter *v.* Richards was cited and commented upon. And we think there is much reason to doubt the soundness of the distinction. See Allen *v.* The Center Valley Co. 21 Conn. 130.

[2] After much fluctuation, the rule is now settled in England that, in cases of bankruptcy, the separate estate shall be applied, in the first instance, to the separate debts, as the joint estate is to the joint debts. *Ex parte* Elton, 3 Ves. 238; Murray *v.* Murray, 5 Johns. Ch. 60; Coll. on Partnership, (Perkins's ed.) § 920, Story on Partnership, § 376; 1 Parsons on Cont. 180. And the rule appears not to be confined to cases of bankruptcy, but to be a general principle of equity in the administration of partnership and separate assets. *Ex parte* Moult, 1 Dea. & Chitty, 44, 73. In this case, the principle of the rule in bankruptcy was thus explained by *Rose*, J.: "It has not been denied that it is an universal maxim in the administration of assets in equity, that the separate estate shall be applied, in the first instance, to the separate creditors, the joint estate to the joint creditors. Mark the distinction, equity does not alter the legal contract; it does not say that the joint creditor shall not be paid out of the assets of both his debtors; but it says only that a commission stops the diligence or action of all the creditors, so that they are all, as it were, to start fair with the commission, as if all their executions had come to the sheriff at the same time. All the joint creditors shall go first to the joint estate, and the separate creditors first to the separate estates; and if there be a surplus of the joint estate, it is carried, according to the interest of the partners, to the respective separate estates; or if a surplus of the separate estates, it is carried to the joint. . . . An ordinary partnership debt is, in law, and in equity likewise, both joint and several; even at law the action lies against one of the two, subject only to a plea in abatement; by execution in an action against both, you may get both joint and several property; for the law contemplates solvency, proceeds upon solvency, or ample means of satisfaction, either in person or property. But equity in bankruptcy proceeds upon insolvency; it does not vary, but only suspends the contract, and that only as long as the assets are inadequate. If there should be a surplus of the separate estate, or of the joint estate, the creditor has the same resource to them as he would have had under his common law execution." In this conntry also, it appears to be established, as a general principle in equity, that the separate estate shall go first to the separate creditors as well as the joint estate to the joint creditors. Murrill *v.* Neill, 8 How. 414; Wilder *v.* Keeler, 3 Paige, 167; Jackson *v.* Cornell, 1 Sandf. Ch. 348; M'Culloh *v.* Dashiell, 1 Harris & Gill, 296; Woddrop *v.* Ward, 3 Dessau. 203; Emanuel *v.* Bird, 19 Ala. 596; Arnold *v.* Hamer, 1 Frem. Ch. (Miss.) 509; Ladd *v.* Griswold, 4 Gilman, 25. But this rule is not universally admitted in this country, even in equity.

though at law the practice has not been so, and there are strong dicta and decisions against it,[1] yet some recent adjudications indicate that the rule may become established at law.[2]

It is now quite certain that the levy of a private creditor of one copartner upon partnership property can give him only what that copartner has; that is, not a separate personal possession of any part or share of the stock or property, but an undivided right or interest in the whole, subject to the payment of debts and the settlement of accounts; including also the right to demand an account.[3]

In Morris *v.* Morris, 4 Grattan, 293, the court were equally divided upon the question, and very elaborate and able opinions were delivered on both sides. In Bell *v.* Newman, 5 Serg. & Rawle, 78, the rule was repudiated by a majority of the court, partly because the question appeared to be affected by statute, and partly because the English rule was supposed to be confined to cases in bankruptcy. And see Camp *v.* Grant, 21 Conn. 41. But *Gibson*, J., dissented, and delivered a very able opinion in favor of the general rule as supported both by authority and the principles of equity. The Supreme Court of Vermont, after a very thorough and able examination of the subject of the administration of partnership and separate property in equity, in the two cases of Washburn *v.* Bank of Bellows Falls, 19 Vt. 278, and Bardwell *v.* Perry, id. 292, *held*, in the latter, "that, as the partnership creditors, in equity, have a prior lien upon the partnership funds, chancery will compel them to exhaust that remedy before resorting to the separate estate; but that, beyond this, both sets of creditors stand precisely equal both at law and in equity." And see In the matter of Sperry's Estate, 1 Ashmead, 347; Tuckers *v.* Oxley, 5 Cranch, 34.

[1] Allen *v.* Wells, 22 Pick. 450; Clegham *v.* Ins. Bank of Columbus, 9 Geo. 319; Kirby *v.* Schoonmaker, 3 Barb. Ch. 48, 49, per *Walworth*, Ch.; Newman *v.* Bagley, 16 Pick. 570; Ladd *v.* Griswold, 4 Gilman, 25, 36; Bell *v.* Newman, 5 Serg. & R. 78, 86; *Ex parte* Moult, as cited *supra*.

[2] The only decision at law within our knowledge, which has gone the full length of giving the separate creditors a preference as to the separate estate, is that of the Superior Court of New Hampshire, in Jarvis *v.* Brooks, 3 Fost. 136. *Perley*, J., in delivering the judgment of the court, after stating that the equitable rule, which secures to the partnership creditor a preference in the application of the partnership estate, had been adopted and acted upon at law in that State, said: "The right of the partnership creditors to a preference, in the application of the partnership funds, having been admitted in this State, the question raised in this case is, whether the corresponding and correlative rule, giving a preference to the individual creditor over his debtor's separate estate, is also to be considered as having been adopted as a branch and member of the same equitable doctrine. If the preference is admitted in favor of the joint creditor, but denied to the separate creditor, the principle of equality and reciprocity, upon which the interference of equity with the legal rule has been vindicated in England, wholly fails. At law, the separate creditor might take his debtor's moiety in the partnership estate, and sell it for his debt. When he comes to assert this legal right, equity interposes with the rule that partnership debts must first be paid out of the partnership property; and in answer to his complaint that equity has taken from him his legal right, he may be told in England that equity, by way of compensation, has given him a corresponding preference in the application of his debtor's separate estate. We have admitted the equitable rule, which takes away the creditor's legal right to satisfy his debt upon an undivided moiety of the partnership property. Principle, consistency, and equal justice to the separate creditors would seem to require that we should also adopt the other branch of the same equitable doctrine, and there is no greater difficulty in administering one branch of the doctrine than the other; both may be directly asserted at law with equal convenience."

[3] In the matter of Smith, 16 Johns. 102; Fox *v.* Hanbury, Cowp. 445; Moody *v.* Payne, 2 Johns. Ch. 548; Doner *v.* Stauffer, 1 Penn. 198; Filley *v.* Phelps, 18 Conn.

As to how such levy and sale, of the interest of one copartner, shall be made by the sheriff, there is much diversity both of practice and of authority. Upon principle, we think the sheriff can neither seize, nor transfer by sale, either the whole stock or any specific portion of it. He should, we think, without any *actual seizure*, sell all the interest of the defendant partner in the stock and property of the partnership. The purchaser would then have a right to demand an account and settlement, and a transfer to himself, of any balance or property to which the copartner whom he sued, would have been entitled.[1] In those

294, 301; White *v.* Woodward, 8 B. Mon. 484; Sutcliffe *v.* Dohrman, 18 Ohio, 181; United States *v.* Hack, 8 Pet. 271, 276; Garbett *v.* Veale, 5 Q. B. 408. See *supra*, p. 186, n. 1.

[1] The rule at law, as to levying an execution, as laid down in the old cases, is this: the sheriff must seize and take actual possession of the whole, sell an undivided moiety, and make the vendee and other partner tenants in common. The amount of money made by the sale would be affected by the fact that the vendee must in equity take his moiety subject to the partnership accounts; but that fact did not change the practice of the sheriff. If, however, the views entertained by courts of equity upon this subject, are to be adopted, a different practice would seem to be required; for, since equity regards the stock as a fund in the hands of the partners, in their partnership capacity, for the settlement of the accounts of the firm, and regards the right of each partner, in his individual capacity, as a mere right to a moiety of the surplus, if any, after the settlement of accounts, and not as a right to any thing tangible, there appears to be no reason for allowing any actual seizure of the property of the firm, but the sheriff should merely transfer a right to an account, and to a moiety of the surplus, if any remain, after the accounts are settled. In England, it would seem, from the late case of Johnson *v.* Evans, 7 Man. & Gr. 240, 249, that the rule first stated is still adhered to. See Heydon *v.* Heydon, 1 Salk. 392; Jacky *v.* Butler, 2 Ld. Raym. 871; Bachurst *v.* Clinkard, 1 Show. 173; Marriott *v.* Shaw, 1 Comyns, 277; King *v.* Manning, 2 id. 616; Parker *v.* Pistor, 3 Bos. & Pull. 288; Chapman *v.* Koops, 3 id. 289. In this country, where the priority of partnership creditors is recognized at law to a very great extent, it becomes a question whether consistency does not require the adoption of the equitable rule above stated. This has been done in New Hampshire. See Morrison *v.* Blodgett, 8 N. H. 238; Gibson *v.* Stevens, 7 N. H. 352; Page *v.* Carpenter, 10 N. H. 77; Dow *v.* Sayward, 12 N. H. 277, 14 id. 9. In Newman *v.* Bean, 1 Foster, 93, it was held that a sheriff, who should take possession of the partnership effects under an execution against a single partner, and exclude the other partners, would be liable to an action. The equitable rule seems also, from a dictum in Sitler *v.* Walker, 1 Freem. Ch. 77, to have been adopted in Mississippi, and there are dicta in support of it in the earlier New York cases. In the Matter of Smith, 16 Johns. 102. But the other rule, as settled in England, is supported by the great current of American authority. In New York, the subject was elaborately considered by *Cowen*, J., in Phillips *v.* Cook, 24 Wend. 389, and it was there held that the sheriff must seize the whole, and sell an undivided moiety, subject in equity to the partnership accounts; and that he might give possession to the vendee, who would hold as tenant in common. And see further, Douglas *v.* Winslow, 20 Maine, 89; Bradbury *v.* Smith, 21 Maine, 117; Reed *v.* Shepherdson, 2 Vt. 120; Aldrich *v.* Wallace, 8 Dana, 287; Church *v.* Knox, 2 Conn. 514; Burgess *v.* Atkins, 5 Blackf. 337; Shaver *v.* White, 6 Munf. 110; Moore *v.* Sample, 3 Ala. 319; White *v.* Woodward, 8 B. Mon. 484; Sutcliffe *v.* Dohrman, 18 Ohio, 181; Reed *v.* Howard, 2 Metc. 36. It was held, in Waddell *v.* Cook, 2 Hill, 47, and Welsh *v.* Adams, 3 Denio, 125, that, if the sheriff sell the whole partnership interest in an execution against one partner, he will be liable in trespass or trover to the other partner. When on an execution against one partner, his moiety is sold, the money belongs to his separate creditor alone; for the rights of the other partners and joint creditors are attached to the goods themselves, and as the goods are sold subject to those rights, they

jurisdictions where attachment on mesne process is allowed, the question whether the sheriff may seize and retain possession of the partnership property, upon an attachment issued by a creditor or one partner, presents still greater difficulties. Probably, however, such seizure and retention would be allowed, wherever a seizure on execution is allowed.[1] Where such seizure is not allowed, it may be impossible for the creditor to secure his lien by attachment, without the aid of statutory provisions specially adapted to the purpose. Where the trustee process, or process of foreign attachment, is in use, perhaps the better way would be for the sheriff to return a general attachment of all the interest of the debtor in the partnership property, and summon the other partners as the trustees of the debtor.[2]

SECTION IX.

OF THE EFFECTS OF DISSOLUTION.

If the dissolution is caused by death of any partner, the whole property goes to the surviving partners. They hold it, however, only for the purpose of settlement; and, therefore, they have, in relation to it, all the power which is necessary for that purpose, and no more.[3] If they carry on the business with the partnership funds, they do so at their own risk, and the representatives

have no claim upon the proceeds. Doner *v.* Stauffer, 1 Penn. 198; Fenton *v.* Folger, 21 Wend. 676. Whether a court of equity or of law would, upon motion, interfere to stay a sale on execution until an account could be taken, is not quite settled. In England, a court of law will not do it. Chapman *v.* Koops, 3 Bos. & Pull. 289; Parker *v.* Pistor, 3 id. 288. In Moody *v.* Payne, 2 Johns. Ch. 548, and in Sitler *v.* Johnson, 1 Frem. Ch. 77, it was held that a court of equity would not, under ordinary circumstances, interfere for such purpose. See Phillips *v.* Cook, 24 Wend. 390, 401, 408, and Brewster *v.* Hammet, 4 Conn. 540. But the doctrine of these cases is decidedly opposed by Mr. Justice Story, (Story on Partnership, p. 380,) as against both principle and authority; and his views are sustained in Cammack *v.* Johnson, 1 Green. Ch. (N. J.) 163, and in Place *v.* Sweetzer, 16 Ohio, 142. See 1 American Ld. Cases, 469, where the whole subject is ably discussed.

[1] See Douglas *v.* Winslow, 20 Maine, 89.

[2] See per *Parker*, C. J., in Morrison *v.* Blodgett, 8 N. H. 254; per *Upham*, J., in Dow *v.* Sayward, 12 N. H. 276.

[3] Barney *v.* Smith, 4 Harr. & Johns. 485; Murray *v.* Mumford, 6 Cow. 441. The same rule would seem to apply in case of the bankruptcy of one partner. The Matter of Norcross, 5 Law Reporter, 124; Tallcott *v.* Dudley, 4 Scammon, 427, 435; Geortner *v.* The Trustees of Canajoharie, 2 Barb. 625, 629. But see Murray *v.* Murray, 5 Johns. Ch. 60, 70. The surviving partner is not entitled to compensation for settling the affairs of the firm. Stocken *v.* Dawson, 6 Beav. 371; Washburn *v.* Goodman, 17 Pick. 519; Colgin *v.* Cummins, 1 Porter, 148; Patton *v.* Calhoun, 4 Grattan, 138.

of the deceased may choose between calling on them for their share of the capital with interest, or with a share of the profits.[1]

The survivors are tenants in common with the representatives of the deceased, of the stock or property in possession;[2] and have all necessary rights against them, to settle the affairs of the concern and pay its debts.[3] After a dissolution, however caused, one who had been a partner has no authority to make or indorse notes or bills with the name of the firm, even if he be expressly authorized to settle the affairs of the firm.[4] There must be a distinct authority to sign for the others who were partners. A

[1] Brown *v.* Litton, 1 P. Wms. 140; Hammond *v.* Douglas, 5 Ves. 539; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Heathcote *v.* Hulme, 1 Jac. & Walk. 122; Jones *v.* Noy, 2 Mylne & Keen, 125; Crawshay *v.* Collins, 2 Russ. 345, 15 Ves. 218; Goodburn *v.* Stevens, 5 Gill, 1; Washburn *v.* Goodman, 17 Pick. 519. In Willett *v.* Blanford, 1 Hare, 253, 272, it was held that the proportion of the profits, to which the representatives of the deceased partner would be entitled, was not necessarily equal to the deceased partner's share of the capital, but would depend upon the nature of the trade, manner of carrying it on, the capital employed, the state of the accounts between the partnership and the deceased partner at the time of his death, and the conduct of the parties after his death. A partner appointed receiver, is not held to account as partner for the profits of money invested in trade. Whitesides *v.* Lafferty, 3 Humph. 150.

[2] In the late case of Buckley *v.* Barber, 6 Exch. 164, 1 Eng. Law & Eq. 506, it was urged, by counsel: "That, at law, the property in personal chattels, whereof merchants are jointly possessed for the purpose of trade, survives; and that the meaning of the maxim, *jus accrescendi inter mercatores locum non habet*, was that, though the legal property survives, the right to the benefit of it, and to bring an action of account against the surviving partner, belonged to the executors of the deceased partner." But the court, in a learned and able decision, by *Parke*, B., sustained the doctrine laid down in the text. But the legal property in *choses in action* belongs to the survivor, and actions upon them must be brought in his name. Martin *v.* Crompe, 1 Ld. Raym. 340. See Smith *v.* Barrow, 2 T. R. 476. Hence, the debts and credits which the surviving partner has in his own right and on account of the partnership, may at law be set off, one against the other. Slipper *v.* Stidstone, 5 T. R. 493; French *v.* Andrade, 6 T. R. 582; Meader *v.* Scott, 4 Vt. 26; Lewis *v.* Culbertson, 11 Serg. & R. 48; Cowden *v.* Elliot, 2 Missouri, 51; Beach *v.* Hayward, 10 Ohio, 455. But when the *choses in action* are reduced to possession, the surviving partner holds the property as tenant, in common with the representative of the deceased partner. It was held, in Hammond *v.* Douglas, 5 Ves. 539, that the good-will of a trade survives. Lord Eldon expressed a doubt on the subject, in Crawshay *v.* Collins, 15 Ves. 227; but that was overruled in Lewis *v.* Langdon, 7 Sim. 421. In Farr *v.* Pearce, 3 Madd. 75, Sir J. Leach seemed to suppose that the good-will of a professional partnership would survive, but not the good-will of a trading partnership. In Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, the case of Hammond *v.* Douglas was declared not to be law, and it was held that the good-will did not survive. For the nature of the good-will of a trade, see Chissum *v.* Dewes, 5 Russ. 29; Bell *v.* Locke, 8 Paige, 75; Williams *v.* Wilson, 4 Sandf. Ch. 379.

[3] Geortner *v.* The Trustees of Canajoharie, 2 Barb. 625; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3.

[4] Abel *v.* Sutton, 3 Esp. 108; Kilgour *v.* Finlyson, 1 H. Bl. 155; Ramsbottom *v.* Lewis, 1 Camp. 279; Parker *v.* Macomber, 18 Pick. 505; Lusk *v.* Smith, 8 Barb. 570; Humphries *v.* Chastain, 5 Geo. 166; Long *v.* Story, 10 Mis. 636; Parker *v.* Cousins, 2 Gratt. 372; Hamilton *v.* Seaman, 1 Smith, (Indiana,) 129, 1 Carter, 185. But see Robinson *v.* Taylor, 4 Penn. St. 242; Davis & Desauque, 5 Whart. 530; Lewis *v.* Reilly, 1 Q. B. 349.

parol authority will be sufficient, even if the general terms of the partnership had been reduced to writing.[1]

Whether a court of equity will give to partnership creditors a remedy against the representatives of a deceased partner, when there is no insolvency, may be doubted. Formerly, the creditor could go only against the surviving partners, and they must look to the representatives of the deceased; but if the firm were insolvent, then the creditors might go at once against the representatives of the deceased, because each partner, and all his property, is bound for the whole debt of the firm.[2] In England it is now settled, by recent decisions, that equity will permit this resort to the representatives of the deceased, even where there is no insolvency, letting them look for an adjustment of what they pay to the surviving partners. And though we cannot say that this is settled American law, it seems to us more consonant with the principles of the law of partnership as now administered.[3]

[1] Smith *v.* Winter, 4 M. & Wels. 454. For a partner's authority generally after dissolution, see Gannett *v.* Cunningham, 34 Maine, 56; Fowle *v.* Harrington, 1 Cush. 146; Story on Partnership, § 325-329, 344, 346; 3 Kent's Com. 63.

[2] Lane *v.* Williams, 2 Vern. 292; Jacomb *v.* Harwood, 2 Ves. Sen. 265; Hankey *v.* Garratt, 1 Ves. Jun. 236; Gray *v.* Chiswell, 9 Ves. 118; Lawrence *v.* The Trustees of the Leake and Watts Orphan House, 2 Denio, 577, 586; Jackson *v.* King, 8 Leigh, 689; Caldwell *v.* Stileman, 1 Rawle, 212; Wilder *v.* Keeler, 3 Paige, 167.

[3] There appear to have been no express decisions in England, upon the question whether the creditors of a firm could resort to the estate of the deceased partner, without showing the insolvency of the survivor, before the case of Devaynes *v.* Noble, 1 Mer. 529, 2 Russ. & My. 495. But the courts appeared to assume that they could not. Gray *v.* Chiswell, 9 Ves. 18. In the case of Devaynes *v.* Noble, it was decided that a partnership creditor could so resort on the ground that partnership debts are in equity both joint and several. And such has ever since been the settled law in England. See Wilkinson *v.* Henderson, 1 Mylne & Keen, 582; Thorpe *v.* Jackson, 2 You. & Coll. 553; Braithwaite *v.* Britain, 1 Keen, 206; Hills *v.* M'Rae, 5 Eng. Law and Eq. 233. In this country there are several early decisions, holding that a partnership creditor cannot resort to the estate of the deceased partner until the whole estate of the survivor is exhausted. Van Reimsdyk *v.* Kane, 1 Gallison, 371; Hubble *v.* Perrin, 3 Hammond, (Ohio,) 287; Marr *v.* Southwick, 2 Porter, 351; Alsop *v.* Mather, 8 Conn. 524. But Mr. Justice *Story* and Mr. Chancellor *Kent* appear to have considered the old doctrine overturned, and the new one, as laid down in Devaynes *v.* Noble, established. Story on Partnership, § 362; 1 Story's Eq. Jur. § 675; 3 Kent's Com. 63. And this doctrine has been followed in the Supreme Court of the United States, in Nelson *v.* Hill, 5 How. 127, where *Daniel*, J., in delivering the opinion of the court, said: "It is now a rule of law, too well settled to be shaken, that the creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner." This doctrine has also been followed in the late case of Camp *v.* Grant, 21 Conn. 41, which overruled several preceding cases in that State, and in Fillyau *v.* Laverty, 3 Florida, 72. In Travis *v.* Tartt, 8 Ala. 574, the case of Marr *v.* Southwick, *supra*, was disapproved, and the late doctrine was recognized as well settled. But in the case of Lawrence *v.* The Trustees of the Leake Orphan House, 2 Denio, 577, *Walworth*, Ch., dissented from the late English doctrine, and adhered to the old one, and his decision was unanimously confirmed by the Court of Errors. See Slatter *v.* Carroll, 2 Sandf. Ch. 573, 580. In some of the States, the same remedy is given by statute against the

It is common, where a partnership is dissolved by mutual consent, to provide that some one of the partners shall settle up the affairs of the concern; collect and pay debts, and the like. But this will not prevent any person from paying to any partner a debt due to the firm; and if such payment be made in good faith, the release or discharge of the partner is effectual.[1] So it is frequently provided that one partner shall take all the property and pay all the debts; but this agreement, though valid between the partners, has no effect upon third parties; for they have a valid claim against all the partners, of which they cannot be divested without their consent.[2] This consent may be inferred; but not from slight evidence; thus, not from receiving the single partner's note as a collateral security, nor from receiving interest from him on the joint debt, nor from a mere change in the head of the account, charging the single partner and not the firm. Still, as the creditor certainly can assent to this arrangement, and accept the indebtedness of one partner instead of that of the firm,[3]

estate of a deceased joint debtor, as if the contract had been both joint and several. Sparhawk *v.* Russell, 10 Metc. 305, 307; Dahlgreen *v.* Duncan, 7 Smedes & Marsh. 280; Maxey *v.* Averill, 2 B. Mon. 107. This right of joint creditors to procced in equity immediately against the separate estate, is subject to the prior right of separate creditors to that estate, where their prior right is acknowledged. See *supra*, note.

[1] Porter *v.* Taylor, 6 Maule & Sel. 156; King *v.* Smith, 4 Car. & Payne, 108; Major *v.* Hawkes, 12 Ill. 298. The rule appears to be this: if the partners have merely given one of their number, or a third person, an authority to receive all the debts due the firm, still, payment to any partner will be good, for the authority is revocable. "It would be otherwise if it appeared that the legal or equitable interest in the partnership effects had been transferred to an assignee; in that event, a debtor who should pay a debt to either of the partners, after notice, would be liable to pay again to the assignee." Per *Trumbull*, J., in Gordon *v.* Freeman, 11 Ill. 14; Combs *v.* Boswell, 1 Dana, 473. The representatives of a deceased partner cannot receive payment. Wallace *v.* Fitzsimmons, 1 Dall. 248. See Pritchard *v.* Draper, 1 Russ. & Mylne, 191; Brasier *v.* Hudson, 9 Sim. 1.

[2] Heath *v.* Percival, 1 P. Wms. 682; Smith *v.* Jameson, 5 T. R. 601; David *v.* Ellice, 5 B. & C. 196; Harris *v.* Farwell, 15 Eng. Law and Eq. 70, 15 Beav. 31; Harris *v.* Lindsay, 4 Wash. C. C. 271.

[3] A question has arisen whether an agreement to accept the indebtedness of a single partner in discharge of a debt of the firm, is void for want of consideration. It is clear that an agreement to discharge a partnership debt, in consideration of receiving a higher kind of security, from a single partner would be valid. So also would an agreement to discharge a partner from his liability on a partnership debt, in consideration of his giving up the partnership funds to a copartner who takes upon himself the debt. Attwood *v.* Banks, 2 Beav. 192; Lodge *v.* Dicas, 3 Barn. & Ald. 611; Livingston *v.* Radcliff, 6 Barb. 201. But whether receiving the sole security of one partner is itself a sufficient consideration for relinquishing the joint security of the same class, has given rise to much discussion. In Lodge *v.* Dicas, 3 Barn. & Ald. 611; David *v.* Ellice, 5 Barn. & Cress. 196; Waydell *v.* Luer, 5 Hill, 448; and Cole *v.* Sackett, 1 Hill, 516, the courts were inclined to hold that it was not a sufficient consideration. See Wildes *v.* Fessenden, 4 Metc. 12; Frentress *v.* Markle, 2 Greene, (Iowa,) 553. But the English cases holding that doctrine, were questioned in Thompson *v.* Percival, 5 Barn. & Ad. 925; Kirwan *v.* Kirwan, 2 Crompt. & Mees. 617, 4 Tyrw. 491; and in Hart *v.* Alexander, 2 Mees. & Wels. 484; and the New York cases were expressly

so it must be equally clear that such assent and intention will bind him if distinctly proved by circumstances.[1]

SECTION X.

OF LIMITED PARTNERSHIPS.

These are unknown in England; but have been introduced into some of our States, by statutes, which differ somewhat in their provisions. Generally, they require, firstly, one or more *general* partners whose names shall be known; secondly, *special* partners who do not appear as members, nor possess the powers or discharge the duties of actual partners; thirdly, the sum to be contributed by the special partners shall be actually paid in; lastly, all these arrangements, with such other information as may be needed for the security of the public, must be verified under

overruled in the Court of Errors, in Waydell *v.* Luer, 3 Denio, 410. See Livingston *v.* Radcliff, 6 Barb. 202; Van Eps *v.* Dillaye, id. 245, 252. Although none of these later cases expressly decided that taking the naked liability of a single partner was a sufficient consideration for the discharge of a claim against the firm, yet the principles laid down obviously lead to that doctrine. Lord *Denman*, in Thompson *v.* Percival, *supra*, said: "Many cases may be conceived in which the sole liability of one of two debtors may be better than the joint liability of the two, either in respect of the solvency of the parties, or the convenience of the remedy, as in cases of bankruptcy or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case, cannot be made the subject of inquiry." See dicta of *Parke*, B., to the same purpose, in Kirwan *v.* Kirwan, 4 Tyrw. 496. In the case of Waydell *v.* Luer, 3 Denio, 418, *Lott*, Senator, said: "It is evident that it may frequently occur that a claim against a firm may in fact be worth less than if held against one of its members, not merely on account of the means of enforcing payment, but as to the availability of the fund out of which it is to be made; and although the learned judge, in delivering his opinion below, says he 'is unable to see how the name of one is better alone than when joined with another's in point of solvency,' yet it is clear, from the principles above referred to, that it may be more available as security. When, therefore, a creditor agrees to release a joint indebtedness, by acceptance of a note or any other obligation of one of his debtors in payment, he receives a consideration which may be more valuable to himself than the original claim. Whether it is in fact so, is wholly immaterial." See Harris *v.* Lindsay, 4 Wash. C. C. 271; Sheehy *v.* Mandeville, 6 Cranch, 253; *Ex parte* Liddiard, 4 Dea. & Ch. 603; Oakeley *v.* Pasheller, 10 Bligh, 548, 4 Clark & Fin. 207.

[1] It appears to have been once held in England that taking a promissory note or bill of exchange from a single partner, was sufficient to discharge the firm. Evans *v.* Drummond, 4 Esp. 92; Reed *v.* White, 5 Esp. 122. And this would seem to be the doctrine now in Maine and Massachusetts, where the giving of a promissory note is regarded as *primâ facie* evidence of payment. Springer *v.* Shirley, 2 Fairf. 204. But elsewhere, it is now clearly settled that the taking of a promissory note of a single partner for a partnership debt is not in itself sufficient evidence of a discharge of the firm. But there must be an agreement to discharge the firm, either express, or such as a jury may reasonably infer from the circumstances. Kirwan *v.* Kirwan, 4 Tyrw. 491; Harris *v.* Farwell, 15 Eng. Law and Eq. 70, 15 Beav. 31; Davis & Desauque, 5 Whart. 531; Parker *v.* Cousins, 2 Grattan, 373, 388; Mason *v.* Wickersham, 4 Watts & Serg. 100; Kinsler *v.* Pope, 5 Strobh. 126; Yarnell *v.* Anderson, 14 Missouri, 619. See Barker *v.* Blake, 11 Mass. 16.

oath, signature, and acknowledgment before a magistrate, and correctly published. When these requisites are complied with, the special partners may lose all they have put in, but cannot be held to any further responsibility. But any neglect of them, or any material mistake in regard to them, even on the part of the printer of the advertisement, wholly destroys their effect; and then the special partner is liable, *in solido*, for the whole debt, precisely like a general partner.[1]

[1] In Bradbury *v.* Smith, 21 Maine, 117, the stock in trade was purchased with the capital advanced by A, under a contract making him a special partner; it was held that the stock could be attached for the private debt of the general partner, whether the parties had so conformed to the statute as to form a special partnership or not. In Merrill *v.* Wilson, 29 Maine, 58, a sole general partner assigned *his* property for the benefit of creditors. It was *held* that the property of the special partnership did not pass. In Bowen *v.* Argall, 24 Wend. 496, it was held that a mistake in the publication of the names of the partners, as Argale for Argall, would not vitiate the publication, because the mistake was not calculated to mislead. In Madison Co. Bank *v.* Gould, 5 Hill, 309, the day of the commencement of the partnership was stated in the public notice to be November 16, while in the original certificate it was October 16. *Held*, that the special partners were not liable as general partners, as the error was unintentional, and the plaintiff could not have been affected by it. It was held also, that if a special partner purchase real estate on account of the firm, or if the title be taken in his name and with his consent, he will be liable as a general partner; but not if his name be used without his consent. In Smith *v.* Argall, 6 Hill, 479, S. C. in Error, 3 Denio, 435, the amount contributed by the special partner was, by mistake of the printer, stated at $5,000, instead of $2,000, and it was *held* that the associates were liable as general partners, although the plaintiff did not show that he was actually misled by the error. In Mills *v.* Argall, 6 Paige, 577, it was *held* that an assignment of the partnership property, providing for the payment of a debt due the special partner, ratably with the other creditors of the firm, or before all the other creditors are satisfied in full for their debts, is void as against the creditors: but it would be valid as against the assignor and those creditors who think proper to affirm it. See Beers *v.* Reynolds, 12 Barb. 288; Beers *v.* Reynolds, 1 Kern. 97.

CHAPTER XII.

OF THE CARRIAGE OF GOODS.

SECTION I.

OF A PRIVATE CARRIER.

One who carries goods for another is either a private carrier or a common carrier.

A private carrier is one who carries for another casually, but who does not pursue the business of carrying as his usual and professed occupation.[1] The contract between him and the owner of the goods which he carries, is one of service, and is governed by the ordinary rules of law. Each party is bound to perform his share of the contract. The carrier must receive, care for, carry, and deliver the goods, in such wise as he bargains to do, whether this bargain be in words, or implied by the law from the nature of the service which he undertakes to render.

If he carries the goods for hire, whether actually paid or due, he is bound to use ordinary diligence and care;[2] by which the law means such care as a man of ordinary capacity would take of his own property under similar circumstances.[3] If any loss or

[1] See Gordon *v.* Hutchinson, 1 W. & S. 285. The distinctions between the liability of the private carrier and the common carrier will be stated hereafter; but it may be said here that, generally, any one who carries goods for another is a private carrier, unless he comes within the definition of a common carrier. See Ross *v.* Hill, 2 C. B. 877.

[2] See Coggs *v.* Bernard, 2 Ld. Raym. 909; Ross *v.* Hill, 2 C. B. 877; Penobscot Boom Corp. *v.* Baker, 16 Maine, 233.

[3] See Jones on Bailments, 5, where the author, speaking of this subject, says: "There are infinite shades of care or diligence from the slightest momentary thought or transient glance of attention to the most vigilant anxiety and solicitude; but extremes, in this case as in most others, are inapplicable to practice; the first extreme would seldom enable the bailee to perform the condition, and the second ought not, in justice, to be demanded; since it would be harsh and absurd to exact the same anxious care which the greatest miser takes of his treasure, from every man who borrows a book or seal. The degrees, then, of care for which we are seeking, must lie somewhere between these extremes; and by observing the different manners and characters of men, we may find a certain standard which will greatly facilitate our inquiry; for, although some are excessively careless, and others excessively vigilant, and some through life, others only at particular times, yet we may perceive that the generality of rational men use nearly

injury occur to the goods while in his charge, from the want of such care or diligence on his part, he is responsible.[1] But if the loss be chargeable as much to the fault of the owner as of the carrier, he is not liable.[2] The owner must show the want of care or diligence on the part of the private carrier, to make him liable; but slight evidence tending that way, would suffice to throw upon him the burden of accounting satisfactorily for the loss.[3]

If he carries the goods without any compensation, paid or promised, he is, in the language of the law, a gratuitous bailee, or mandatory; he is now bound only to slight care;[4] which is such care as every person, not insane or fatuous, would take of

the same degree of diligence in the conduct of their own affairs; and this care, therefore, which every person of common prudence and capable of governing a family takes of his own concerns, is a proper measure of that which would uniformally be required in performing every contract, if there were not strong reasons for exacting in some of them a greater, and permitting in others a less degree of attention." And see Vaughan *v.* Menlove, 3 Bing. N. C. 468; Gordon *v.* Hutchinson, 1 W. & S. 285; Tompkins *v.* Saltmarsh, 14 S. & R. 280.

[1] Beck *v.* Evans, 16 East, 244. In this case, the plaintiff had sent a cask of brandy by the defendant's wagon, from Shrewsbury to London. Before the wagon reached Birmingham, it was perceived, by persons in the wagon, that the cask was leaking fast, and the driver was informed of it; but, though he stayed three hours in Birmingham, after his arrival there, he made no examination of the cask, nor took any step to prevent the leakage. He passed in like manner through Wolverhampton, where the wagon also made some stay, without regard to the cask; but at the next stage beyond Wolverhampton, having some parcels to deliver, he took the cask out, and the remainder of the brandy was saved. It was left to the jury to consider whether the injury arose from the negligence of the defendant's servant, the wagoner, in not examining the cask after he was informed of its leaky state, at either of the places where he halted; and the jury having found in the affirmative, an application for a rule to set aside the verdict on account of the misdirection of the judge, was refused by the King's Bench. And see Goff *v.* Clinkard, cited 1 Wils. 282; Mackenzie *v.* Cox, 9 C. & P. 632; Ross *v.* Hill, cited *supra*, p. 196, n. 1; Rogers *v.* Head, Cro. Jac. 262; Sheldon *v.* Robinson, 7 N. H. 157; Satterlee *v.* Groat, 1 Wend. 272; Freeman *v.* Birch, 1 Nev. & M. 430.

[2] Whalley *v.* Wray, 3 Esp. 74. This was an action of *assumpsit* against the defendant as a lighterman, for damage done to plaintiff's goods, which had been intrusted to him to be deposited in the plaintiff's warehouse. Before the goods could be permitted to be landed, it was necessary to present a petition to the commissioners of the customs, who refer it to the land surveyor, upon whose report the goods are permitted to be landed. A petition had been presented by S., who was the custom-house agent, to the plaintiff; but no report having been made of it, the land surveyor refused to permit the goods to be landed; in consequence of which they remained in the lighter undischarged, where they received the damage for which the action was brought. The presenting of the petition was usually done by the custom-house agent of the party to whom the goods belonged, not by the lighterman. *Held*, that the plaintiff could not recover. See Robinson *v.* Dunmore, 2 B. & P. 416; Lord *Abinger*, Brind *v.* Dale, 8 C. & P. 207; Califf *v.* Danvers, 1 Peake's Cas. 114.

[3] Beckman *v.* Shouse, 5 Rawle, 179; Clark *v.* Spence, 10 Watts, 335; Runyan *v.* Caldwell, 7 Humph. 134; Platt *v.* Hibbard, 7 Cow. 500, n. (a); Schmidt *v.* Blood, 9 Wend. 268; Foote *v.* Storrs, 2 Barb. 326; Harrington *v.* Snyder, 3 Barb. 380.

[4] Shiells *v.* Blackburne, 1 H. Bl. 158; Stanton *v.* Bell, 2 Hawks, 145; and see cases cited *ante*, p. 196, n. 2.

his own property.[1] For the want of this care, which would be gross negligence, he is responsible, but not for ordinary negligence.[2]

Whether a private carrier has a lien on the goods he carries, for his compensation, or, in other words, whether he may hold them until that be paid, is not certainly determined, but we think it probable he has. If he incurs expenses about the goods, for sufficient reason, and in good faith, he has undoubtedly a lien on them for those expenses.

SECTION II.

OF THE COMMON CARRIER.

The law in relation to the rights, the duties, and responsibilities of a common carrier, is quite peculiar. The reasons for it are discernible, but it rests mainly upon established usage and custom. And as these usages have changed considerably in modern times, this law has undergone modifications, and on some points may be considered as even now in a transition state.

The rights and responsibilities of the common carrier may be briefly stated thus: — He is bound to take the goods of all who offer, if he be a carrier of goods, and the persons of all who offer, if he be a carrier of passengers; and to take due care and make due transport and due delivery of them. He has a lien on the

[1] See Jones on Bailments, 8; Mytton *v.* Cock, 2 Strange, 1099; Rooth *v.* Wilson, 1 B. & Ald. 61; Foster *v.* Essex Bank, 17 Mass. 479; Chase *v.* Maberry, 3 Harring. 266. In Whitney *v.* Lee, 8 Met. 91, where a promissory note was delivered to the defendant on his voluntary undertaking, without reward, "to secure and take care of it," it was held that he was not bound to take any active measures to obtain security, but was simply bound to keep the note carefully and securely, and receive the money due thereon when offered.

[2] The great leading case in support of the propositions above laid down in the text, is that of Coggs *v.* Bernard, 2 Ld. Raym. 909. In this case, the declaration stated that the defendant undertook to remove several hogsheads of brandy, then in a cellar in D., and safely lay them down again in a certain other cellar in Water Lane; and that the said defendant and his servants managed so negligently that one of the casks was stayed. After not guilty pleaded and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. But the court were unanimously of opinion that if a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his negligence, although he was not a common carrier, and was to have nothing for his carriage. The plaintiff, therefore, had judgment. And see Doorman *v.* Jenkins, 2 Ad. & El. 256; Tracy *v.* Wood, 3 Mason, 132; Garnett *v.* Willan, 5 B. & Ald. 53.

goods which he carries, and on the baggage of passengers, for his compensation. He is liable for all loss or injury to the goods under his charge, unless it happens from the act of God, or from the public enemy. These three rules will be considered in the next section.

He is a common carrier "who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place;"[1] or, as we should prefer to say, from some known and definite place or places, to other known and definite place or places. He is one who undertakes the carriage of goods *as a business;* and it is mainly this which distinguishes him from the private carrier.[2] In one or two of the courts of this country there has been a disposition to annul this distinction; and to affect all persons who carry goods for hire, whether casually and by special employment, or as a general business, with the same liabilities.[3] But this disposition is not general, and we do not believe it will be permanent anywhere; for we see nothing in the condition

[1] Per *Parker*, C. J., in Dwight *v.* Brewster, 1 Pick. 50. A similar definition is given by *Gilchrist*, C. J., in Elkins *v.* The Boston and Maine R. R. Co. 3 Foster, 275. And see Mershon *v.* Hobensack, 2 New Jersey, 372; Gibson *v.* Hurst, 2 Salk. 249; Robertson *v.* Kennedy, 2 Dana, 430.

[2] In Coggs *v.* Bernard, 2 Ld. Raym. 909, Lord *Holt* speaks of the carriage of goods for hire as "either a delivery to one that exercises a public employment, or a delivery to a private person." And see Citizens' Bank *v.* Nantucket Steamboat Company, 2 Story, 32.

[3] See Gordon *v.* Hutchinson, 1 W. & S. 285. The facts of this case were, that the defendant, being a farmer, applied at the store of the plaintiff for the hauling of goods from Lewiston to Bellfont, upon his return from the former place, where he was going with a load of iron. He received an order, and loaded the goods. On the way, the head came out of a hogshead of molasses, and it was wholly lost. In this action the plaintiff claimed to recover the price of it. The defendant contended that he was not subject to the responsibilities of a common carrier, but only answerable for negligence, inasmuch as he was only employed occasionally to carry for hire. But the court below instructed the jury that the defendant was answerable upon the principles which govern the liabilities of a common carrier. And the Supreme Court held the instructions to be correct. And in M'Clure *v.* Richardson, Rice, 215, the defendant was the owner of a boat, in which he was accustomed to carry his own cotton to Charleston, and occasionally, when he had not a load of his own, to take for his neighbors, they paying freight for the same. One Howzer was the master or patroon of the boat, and the general habit was for those who wished to send their cotton by the defendant's boat, to apply to the defendant himself. On this occasion, the patroon had been told to take Col. Goodwin's and Mr. Dallas's cotton, which he had done, when the plaintiff applied to Howzer, in the absence of defendant, to take on board two bales of cotton, asking him if it was necessary to apply to the defendant himself, to which Howzer replied he thought not, and received the cotton. Under these circumstances, it was held that the defendant was bound to the acts of Howzer, as being within the general scope of the authority conferred upon by placing him in the situation of master of the boat, and that the defendant was consequently chargeable as a common carrier for any loss of, or damage to the plaintiff's cotton. And in the following cases it was laid down, in general terms, that all persons carrying goods for hire, come under the denomination of common carriers. M'Clures *v.* Hammond, 1 Bay, 99; Moses *v.* Norris, 4 N. H. 304; Turney *v.* Wilson, 7 Yerg. 340; Craig *v.* Childress, 1 Peck. 270.

of our country, or of our carrying business, which calls for this change in the law.[1]

Truckmen or draymen, porters, and others who undertake the carriage of goods for all applicants from one city or town to another, or from one part of a city to another, are chargeable as common carriers.[2] So, proprietors of stage coaches are charge-

[1] It would seem to be an insuperable objection to all the cases cited in the preceding note, that they exclude from the common carrier one of his most important characteristics, namely, his obligation to carry the goods of any person offering to pay his hire; for, in several of them it was conceded that the person whom they held liable was under no obligation to undertake the carrying in question. The case of Chevallier *v.* Straham, 2 Texas, 115, may be thought to sanction the doctrines laid down in the cases in the preceding note, but we think it does not. In that case it appeared that the defendant's principal business was farming, but that at a certain period of the year, known as the hauling season, he engaged in the forwarding business, and ran his wagon whenever he met with an opportunity. Under these circumstances, he was held liable as a common carrier. And the court said: "From a comparison of the various authorities to which we have referred for the distinguishing characteristics of both common and private carriers, it may be laid down as a rule that all persons who transport goods from place to place for hire, for such persons as see fit to employ them, whether usually or occasionally, whether as a principal or incidental and subordinate occupation; are common carriers, and incur all their responsibilities. There are no grounds in reason why the occasional carrier, who periodically in every recurring year abandons his other pursuits, and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business their constant and principal occupation. For the time being he shares all the advantages arising from the business; and as the extraordinary responsibilities of a common carrier are imposed by policy and not the justice of the law, this policy should be uniform in its operation, — imparting equal benefits, and inflicting the like burdens upon all who assume the capacity of public carriers, whether temporarily or permanently, periodically or continuously." It will be seen that the only question involved in this case was, whether it was necessary, in order to constitute one a common carrier, that he should hold himself out as such continuously, or whether it was sufficient if he held himself out as such during a certain period of the year. Under the circumstances, there can be no doubt that the defendant would have been bound to carry for any one who wished to employ him during the season in question; and upon this ground he was held to be a common carrier. That no one can be considered as a common carrier, unless he has in some way held himself out to the public as a carrier, in such a manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him, seems to be the true test. See Samms *v.* Stewart, 20 Ohio, 69; —— *v.* Jackson, 1 Hayw. 14; Fish *v.* Chapman, 2 Georgia, 349. In this case the court say of the case of Gordon *v.* Hutchinson, that there can be little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient. And see Satterlee *v.* Grant, 1 Wend. 272; Kimball *v.* Rut. and Bur. R. R. Co. 26 Vt. 247.

[2] Robertson *v.* Kennedy, 2 Dana, 430. This was an action against the defendant for the loss of a hogshead of sugar, which he, as a common carrier, had undertaken, for a reasonable compensation, to carry from the bank of the river in Brandenburgh to the plaintiff's store, in the same town. At the trial the plaintiff introduced evidence tending to show that the defendant had been in the habit of hauling for hire in the town of Brandenburgh, for every one who applied to him, with an ox team driven by his slave; that he had undertaken to haul for the plaintiff the hogshead in question; and that, after the defendant's slave had placed the hogshead on a slide, for the purpose of hauling it to the defendant's store, the slide and hogshead slipped into the river, whereby the sugar was spoiled. Under these circumstances, the court held that the defendant was liable as a common carrier. In Brind *v.* Dale, 8 C. & P. 207, Lord *Abinger* expressed the opinion that a town carman, whose carts fly for hire near the wharves, and who lets them by the hour, day, or job, is not a common carrier. But the correctness of this opinion is questioned by Mr. Justice *Story*. See Story on Bailments, § 496. And the case itself must be considered as shaken, if not directly overruled, by the case

able as common carriers of passengers, and of the baggage of passengers; or of others, if they so advertise themselves.[1] So are hackney coachmen within their accustomed range.

In this country, in recent times, the business of carrying goods and passengers is almost monopolized by what are called expressmen, by railroads, or by lines of steam packets along our coasts, or upon our navigable streams or lakes. These are undoubtedly common carriers; and although their peculiar method of carrying on this business is new, and will presently require from us especial consideration, there can be no doubt of their being, to all intents and purposes, common carriers.[2]

of Ingrate *v.* Christie, 3 Carr. & Kir. 61. That was an action against a lighterman, who was in the habit of carrying goods, for all persons who wished to employ him, from the wharves in London to the ships in the harbor. The question being raised whether the defendant was a common carrier, and Story on Bailments cited, *ubi supra*, *Alderson*, B., said: "Mr. Justice Story is a great authority; and if we would but adhere to principle, the law would be, what it ought to be, a science. There may be cases on all sides, but I will adhere to principle, if I can. If a person holds himself out to carry goods for every one as a business, and he thus carries from the wharves to the ships in harbor, he is a common carrier; and if the defendant is a common carrier, he is liable here. There must be a verdict for the plaintiff."

[1] "If a coachman commonly carry goods, and take money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's, or a stranger's." Per *Jones*, J., in Lovett *v.* Hobbs, 2 Show. 127. So, in Dwight *v.* Brewster, 1 Pick. 50, it was held that the practice of carrying for hire, in a stage coach, parcels not belonging to passengers, constitutes the proprietors of the coach common carriers. And see Beckman *v.* Shouse, 5 Rawle, 179; Clark *v.* Faxton, 21 Wend. 153; Jones *v.* Voorhees, 10 Ohio, 145; Merwin *v.* Butler, 17 Conn. 138. But in Sheldon *v.* Robinson, 7 N. H. 157, it was *held* that the driver of a stage coach, in the general employ of the proprietors of the coach, and in the habit of transporting packages of money for a small compensation, which was uniform, whatever might be the amount of the package, was a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common carrier, there being no evidence to show him a common carrier, further than the fact that he took such packages of money as were offered. And *Parker*, J., said: "The evidence does not show the defendant a common carrier. It does not show him to have exercised the business of carrying packages, as a public employment, because his public employment was that of a driver of a stage-coach, in the employ of others. It does not show that he ever undertook to carry goods or money for persons generally, although he may in fact have taken all that was offered, as a matter of convenience; or that he ever held himself out as ready to engage in the transportation of whatever was requested, notwithstanding it may have been usual for him and other drivers to carry it. This was not his general employment, and there is nothing to show that he would have been liable, had he refused to take this money, especially as he was in the service of another, and, as such servant, might have had duties to perform inconsistent with the duty of a common carrier. The amount to be paid for transportation is also to be considered. A common carrier is an insurer, and entitled to be paid a premium for his insurance. There being no evidence that any compensation was agreed on between these parties, it is to be presumed that the usual compensation was to be paid. The plaintiff might have relied on the usage upon a claim of payment. And as the sum was small and uniform, whatever might be the amount of money, it would seem very clear that no one committing a package of money to the defendant under such circumstances, and without any special agreement, could have considered him an insurer of safety." See also Bean *v.* Sturtevant, 8 N. H. 146.

[2] In Thomas *v.* B. and P. Railroad Co. 10 Met. 472, *Hubbard*, J., remarking upon

Ordinary sailing vessels are sometimes said to be common carriers. We should be disposed to restrict this term, however, to regular packets; or at most, to call by this name, general freighting ships. It is not, however, necessary to consider this question, as water-borne goods are now always carried under bills of lading, which determine the relations and respective rights of the parties; and these we shall consider in our chapter on the law of shipping.

The boatmen on our rivers and canals are common carriers;[1] and ferrymen are, perhaps, common carriers of passengers by their office, and may become common carriers of goods by taking up that business.[2] A steamboat usually employed as a carrier, may do something else, as tow a vessel out of a harbor, or the like, and her usual character does not attach to this especial employment and carry with it its stringent liabilities. Therefore, for a loss occurring to a ship in her charge while so employed, the owner of the steamer is liable only for negligence on the part of those whom he employs.[3]

the liability of railroad companies as common carriers, said: "The introduction of railroads into the State has been followed by their construction over the great lines of travel, of passengers, and the transportation of merchandise; and the proprietors of these novel and important modes of travel and transportation, which have received so much public favor, have become the carriers of great amounts of merchandise. They advertise for freight; they make known the terms of carriage; they provide suitable vehicles, and select convenient places for receiving and delivering goods; and as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law, which are applicable to carriers." And see McArthur *v.* Sears, 21 Wend. 190.

[1] See McArthur *v.* Sears, 21 Wend. 190; Turney *v.* Wilson, 7 Yerg. 341; Gordon *v.* Buchanan, 5 Yerg. 71.

[2] See Pomeroy *v.* Donaldson, 5 Missouri, 36; Cohen *v.* Hume, 1 McCord, 439; Smith *v.* Seward, 3 Barr. 342; Fisher *v.* Clisbee, 12 Ill. 344. In Littlejohn *v.* Jones, 2 McMullan, 365, it was held that the owner of a private ferry might so use it (although on a road not opened by public authority or repaired by public labor) as to subject himself to the liability of a common carrier.

[3] Caton *v.* Rumney, 13 Wend. 387; Alexander *v.* Greene, 3 Hill, 9. In this last case, *Bronson*, J., said: "I think the defendants are not common carriers. They do not receive the property into their custody, nor do they exercise any control over it, other than such as results from the towing of the boats in which it is laden. They neither employ the master and hands of the boats towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The goods or other property remain in the care and charge of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the defendants, it can hardly be pretended that they would be answerable, and yet carriers must answer for such a loss." This case afterwards, however, came before the Court of Errors, and that court reversed the judgment of the Supreme Court. But upon what principle of law cannot be learned from the opinions delivered. And in the more recent case of Wells *v.* Steam Navigation Co. 2 Comst. 207, in the Court of Appeals of the same State, this decision of the Court of Errors was declared to be of no authority, and the former decisions of the Supreme Court were established. And see, to the same effect, Leonard *v.* Hendrickson, 18 Penn. St. 40. It has been

The same person may be a common carrier and also hold other offices or relations. He may be a warehouseman, a wharfinger, or a forwarding merchant. The peculiar liabilities of the common carrier, (to be spoken of presently,) do not attach to either of these offices or employments. Thus, a warehouseman is liable for loss of the goods which he takes for storage, only in case of his own negligence; he is not, as a common carrier is said to be, an insurer of the goods.[1] The question then arises when the liability of such a person is that of a warehouseman, and when it is that of a carrier. If a carrier receives goods to be stored until he can carry them, — a canal boatman, for example, — or if at the end of the transit, he stores them for a time for the safety of the goods or the convenience of the owner, while thus stored he is liable only as warehouseman.[2] But if he puts them into his store or office only for a short time, and for his own convenience, either at the beginning or the end of the transit, they are in his hands as carrier.[3] Where these relations seem to unite and mingle in one person, it may be said to be the general rule that, wherever the deposit, in whatever place or building, is secondary and subordinate to the carriage of the goods, which is therefore the chief thing, the party taking the goods is a carrier; and otherwise a depositary only of some kind.[4] If, therefore,

held, however, in Louisiana, that the owners of steam tow-boats are liable as common carriers. See Smith *v.* Pierce, 1 Louis. 349; Adams *v.* New Orleans Steam Tow-boat Co. 11 Louis. 46. And Mr. Justice *Kane*, of the United States District Court for the Eastern District of Pennsylvania, in the case of Vanderslice *v.* Steam Tow-boat Superior, 13 Law Reporter, 399, urged very strongly the reasons for holding them so liable, but did not decide the point.

[1] See Foote *v.* Storrs, 2 Barb. 326; Hatchett *v.* Gibson, 13 Ala. 587; Chenowith *v.* Dickinson, 8 B. Mon. 156; Caleff *v.* Danvers, Peck, 114; Platt *v.* Hibbard, 7 Cow. 497; Knapp *v.* Curtis, 9 Wend. 60.

[2] Garside *v.* Trent and Mercy Navigation, 4 T. R. 581. In this case the defendants, being common carriers between Stourport and Manchester, received goods from the plaintiff, at Stourport, to be carried to Manchester, and to be forwarded from the latter place to Stockport. The defendants carried the goods to Manchester, and there put them in their warehouse, in which they were destroyed by an accidental fire before they had an opportunity of forwarding them. The court held that they were not answerable for the loss. And see Brown *v.* Denison, 2 Wend. 593; Ackley *v.* Kellogg, 8 Cow. 223; Platt *v.* Hibbard, 7 Cow. 497. See also Roberts *v.* Turner, 12 Johns. 232.

[3] Camden, &c., Transportation Co. *v.* Belknap, 21 Wend. 354; Woods *v.* Devin, 13 Ill. 746; Moses *v.* Boston and Maine R. R. 4 Foster, 71; Teall *v.* Sears, 9 Barb. 317.

[4] In *In re* Webb, 8 Taunt. 443, A, B, C, and D, in partnership as carriers, agreed with S. & Co., of Frome, to carry goods from London to Frome, where they were to be deposited in a warehouse belonging to the partnership at Frome, where A resided, without any charge for the warehouse room, till it should be convenient for S. & Co. to take the goods home. Goods of S. & Co., carried by the partners from London to Frome, under this agreement, were deposited in the warehouse at the latter place, and destroyed by fire. *Held*, that the partners were not liable. So, in Thomas *v.* B. and P. R. R. Co. 10 Met. 472, it was held that the proprietors of a railroad, who transport

goods are delivered to a carrier, or at his depot or receiving room, with directions not to carry them until further orders, he is only a depositary and not a carrier, until those orders are received; but when they are received, he becomes a carrier; and if the goods are afterwards lost or injured before their removal, he is liable as a common carrier.[1]

SECTION III.

OF THE OBLIGATION OF THE COMMON CARRIER TO RECEIVE AND CARRY GOODS OR PASSENGERS.

He cannot refuse to receive and carry goods offered, without good cause; for, by his openly announcing himself in any way as engaged in this business, he makes an offer to the public which becomes a kind of contract as to any one who accepts it.[2] He may demand his compensation, however; and if it be refused, he may refuse to carry the goods; nor is he bound to carry them if security be offered to him, but not the money.[3] So he may refuse if his means of carriage are already fully employed;[4] if he cannot carry the goods without danger to them, or to himself or

goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods from the warehouse, but are liable, as depositaries, only for ordinary care. And see, to the same effect, Norway Plains Co. *v.* B. and M. R. R. 1 Gray, 263.

[1] In Moses *v.* B. and M. R. R. 4 Fost. 71, it was held that, where a railroad corporation, being common carriers, have a warehouse at which they receive goods for transportation, and goods are delivered there with instructions to forward presently, while the goods remain in the warehouse for the convenience of the railroad, until they can be forwarded in the usual course of business, the railroad holds them, as common carriers, and is liable for them as such. But if the goods are kept back in the warehouse for the convenience of the owner, and by his order, while they are so detained the railroad will not be liable as common carriers, but as depositaries only. And instructions to forward goods forthwith may be inferred from an established course of dealing between the owner and carrier, without direct evidence of instructions.

[2] See Jackson *v.* Rogers, 2 Show. 327; Lane *v.* Cotton, 12 Mod. 472; Pickford *v.* The Grand Junction Railway Co. 8 M. & W. 372; Johnson *v.* Midland Railway Co. 4 Exch. 367.

[3] But if the freight money be not demanded, and the owner of the goods be willing and ready to pay it, he need not make a formal tender. See Pickford *v.* Grand Junction Railway Co. 8 M. & W. 372.

[4] Thus, in Lovett *v.* Hobbs, 2 Show. 127, which was an action against a coachmaster for refusal to carry goods, evidence that the coach was full, was agreed to be a good answer. But where the defendants, being common carriers, had issued excursion tickets for a journey, it was held that they were not excused from carrying passengers according to their contract, upon the ground that there was no room for them in their conveyance; but, in order to avail themselves of this answer, they should make their contract conditional upon there being room. Hawcroft *v.* The Great Northern Railway Co. 8 Eng. Law and Eq. 362.

other goods;[1] or without extraordinary inconvenience;[2] or if they are not such goods as it is his regular business to carry.[3] He is always entitled to his *usual* charge;[4] but not to extraordinary compensation, unless for extraordinary service.[5]

The common carrier of goods is bound to receive them in a suitable way, and at suitable times and places. If he has an office or station, he must have proper persons there and proper means of security. During the transit, and at all stopping places, due care must be taken of all goods; and that means the kind and measure of care appropriate for goods of that description. If he have notice, by writing on the article or otherwise, of the need of peculiar care, as "glass, with great care," or "this side uppermost," or "to be kept dry," he is bound to comply with such directions, supposing them not to impose unnecessary care or labor.[6]

If he carry passengers, he must receive all who offer;[7] carry

[1] See Edwards *v.* Sherratt, 1 East, 604; Pate *v.* Henry, 5 Stew. & Porter, 101.

[2] Lane *v.* Cotton, 1 Ld. Raym. 646.

[3] Sewall *v.* Allen, 6 Wend. 335; Johnson *v.* The Midland Railway Co. 4 Exch. 367; Citizens' Bank *v.* Nantucket Steamboat Co. 2 Story, 16. In Tunnell *v.* Pettijohn, 2 Harrington, 48, it was held that, to charge a person as a common carrier, it must be shown that the usage of his business includes the goods carried, or that there was a special contract to carry them.

[4] Harris *v.* Packwood, 3 Taunt. 264; Pickford *v.* Grand Junction Railway Co. 10 M. & W. 399.

[5] See Crouch *v.* The London, &c. Railway Co. 2 Car. & Kir. 789. In Tyly *v.* Morrice, Carth. 486, where a carrier was to carry a bag of gold across Hownslow Heath, it was held that he was entitled to charge a rate of remuneration proportional to the increased risk. And see, per *Best*, J., in Riley *v.* Horne, 5 Bing. 217; Hollister *v.* Nowlen, 19 Wend. 239.

[6] Thus, in Hastings *v.* Pepper, 11 Pick. 41, where a box containing a glass bottle filled with oil of cloves, was delivered to a common carrier, marked, "Glass — with care — this side up," it was held that this was a sufficient notice of the value and nature of the contents to charge him for the loss of the oil, occasioned by his disregarding such direction. And *Shaw*, C. J., in delivering the opinion of the court, said: "As the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carrying goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix his own rate of carriage, or refuse altogether to take the goods with such directions, the court are all of opinion that, if a carrier accepts goods for carriage thus marked, he is bound to carry the goods in the manner and position required by the notice." And see also, Sager *v.* Portsmouth, &c., Railroad Co. 31 Maine, 228.

[7] Thus, in Bennett *v.* Dutton, 10 N. H. 481, it was held that the proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal; and that it was not a lawful excuse that they ran their coach in connection with another coach, which extended the line to a certain place, and had agreed with the proprietor of such other coach not to receive passengers who came from that place on certain days, unless they came in his coach. The defendant was one of the proprietors and driver of a stage-coach running daily between Amherst and Nashua, which connected at the latter place with another coach running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell

them over the whole route,[1] and at a proper speed,[2] or supply proper means of transport; demand only a reasonable or usual compensation;[3] notify his passengers of any peculiar dangers;[4] treat all alike, unless there be actual and sufficient reason for the distinction, as in the filthy appearance, dangerous condition, or misconduct of a passenger; behave to all with civility and decorum;[5] and employ competent persons for all duties; and for

to Amherst and onward to Francestown. A third person ran a coach to and from Nashua and Lowell, and the defendant agreed with the proprietor of the coach connecting with his line, that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day that they applied for passage to the places above Nashua. The plaintiff was notified at Lowell of this arrangement, but notwithstanding came from Lowell to Nashua in that coach, and there demanded a passage in the defendant's coach to Amherst, tendering the regular fare. Upon these facts it was *held*, that the defendant was bound to receive him, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business. But this obligation of the passenger carrier is subject to the conditions of there being sufficient room; that the person applying for carriage is a fit person to be received as a passenger, and that he has no design to interfere in any way with the carrier's interests, or to disturb his line of patronage. So all persons may be excluded who refuse to obey the reasonable regulations which are made for the government of the line; and the carrier may rightfully inquire into the habits or motives of passengers who offer themselves. See Jencks *v.* Coleman, 2 Sumn. 221. This was an action against the proprietor of a steamboat, running from New York to Providence, for refusing to receive the plaintiff on board as a passenger. The plaintiff was the known agent of the Tremont Line of Stage-coaches. The proprietors of the steamboats President and Benjamin Franklin had, as the plaintiff knew, entered into a contract with another line, called The Citizens' Stage-coach Company, to carry passengers between Boston and Providence, in connection with the boats. The plaintiff had been in the habit of coming on board the steamboats at Providence and Newport, for the purpose of soliciting passengers for the Tremont Line, which the proprietors of The President and Benjamin Franklin had prohibited. It was *held* that, if the jury should be of opinion that the above contract was reasonable and *bonâ fide*, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation in order to carry this contract into effect, the proprietors of the steamboat would be justified in refusing to take the plaintiff on board. And in Commonwealth *v.* Power, 7 Met. 596, it was held that, if an innkeeper, who has frequently entered a railroad depot and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars, with a *bonâ fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants therefore forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery.

[1] Dudley *v.* Smith, 1 Camp. 167; Massiter *v.* Cooper, 4 Esp. 260. In Coppin *v.* Braithwaite, 8 Jur. 875, it is said to have been ruled, by *Rolfe*, B., at Nisi Prius, that a carrier having received a pickpocket as a passenger on board his vessel, and taken his fare, he cannot put him on shore at an intermediate place, so long as he is not guilty of any impropriety. But see preceding note.

[2] See Carpue *v.* The L. and R. Railway Co. 5 Q. B. 747; Mayor *v.* Humphries, 1 C. & P. 251. And see, per *Best*, C. J., 8 C. & P. 694, n. (b); Stokes *v.* Saltonstall, 13 Pet. 181.

[3] See *ante*, p. 205, n. 5.

[4] Laing *v.* Colder, 8 Penn. St. 479.

[5] Chamberlain *v.* Chandler, 3 Mason, 242; Keene *v.* Lizardi, 5 Louis. 431.

failure in any of these particulars, he is responsible to the extent of any damage caused thereby, including, in many cases, pain and injury to the feelings.[1] He is also bound to deliver to each passenger all his baggage at the end of his journey;[2] and is held liable if he delivers it to a wrong party on a forged order, and without personal default.[3]

Lastly, he must make due delivery of the goods, to the sender, or to the person whom the sender may appoint,[4] and at the proper time,[5] in the proper way, and at the proper place.[6] As to the party to whom the goods should be delivered, he should be the owner or sender, or some one authorized by him.[7] And if a party authorized to receive them, refuse, or is unable to do so, the carrier must keep them for the owner, and with due care; but now under the liability of a warehouseman, and not of a carrier.[8] So he must keep them for the owner, if he has good

[1] Stokes *v.* Saltonstall, 13 Pet. 181; McKinney *v.* Neil, 1 McLean, 550; Peck *v.* Neil, 3 McLean, 24; McElroy *v.* N. and L. R. R. Co. 4 Cush. 400.

[2] See Lewis *v.* The Western Railroad Corp. 11 Met. 509; Eagle *v.* White, 6 Whart. 505; Thomas *v.* The B. and P. Railroad Corp. 10 Met. 472; Strong *v.* Natally, 4 B. & P. 16.

[3] See Devereux *v.* Barclay, 2 Barn. & Ald. 702; Powell *v.* Myers, 26 Wend. 591.

[4] Thus, in Gibson *v.* Culver, 17 Wend. 305, it was held that a common carrier remains liable until the actual delivery of the goods to the consignee, or if the course of business be such that delivery is not made to the consignee, his liability, in the absence of usage, continues until notice of the arrival of the goods be given. And see McHenry *v.* Railway Co. 4 Harring. 448; Eagle *v.* White, 6 Whart. 505; Fisk *v.* Newton, 1 Denio, 45; Wardell *v.* Mourillyan, 2 Esp. 693; Hyde *v.* Trent and Mersey Navigation, 5 T. R. 389.

[5] Favor *v.* Philbrick, 5 N. H. 358; Wallace *v.* Vigus, 4 Blackf. 260.

[6] See Golden *v.* Manning, 3 Wils. 429; Storr *v.* Crowley, McL. & Y. 129; Wardell *v.* Mourillyan, 2 Esp. 693.

[7] See *ante*, note 4. In Lewis *v.* The Western R. R. Co. 11 Met. 509, it was *held*, that if A, for whom goods are transported by a railroad company, authorizes B to accept the delivery thereof, and to do all acts incident to the transportation and delivery thereof to A, and B, instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B in hauling the car to such depot, and B then requests and obtains leave of that company to use its machinery to remove the goods from the car, then the company that transported the goods is not answerable for the want of care and skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged for any loss that may happen in the course of such delivery to A.

[8] Thus, in Fisk *v.* Newton, 1 Denio, 45, where the consignee of certain kegs of butter, sent from Albany to New York by a freight barge, was a clerk, having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and after reasonable inquiries by the carrier's agent could not be found, it was held that the carrier discharged himself from further responsibility by depositing the property with a storehouse keeper, then in good credit for the owner, and taking his receipt for the same, according to the usual course of business in the trade, though the butter was subsequently sold by the storehouse keeper, and the proceeds lost to the owner by failure. And *Jewett*, J., said: "When goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to

reason to believe that the consignee is dishonest and will defraud the owner of his property.[1] As to the time, it must be within the proper hours for business, when the goods can be suitably stored;[2] or if to the sender himself, or at his house, then at some suitable and convenient hour;[3] and without unnecessary delay,[4] or as soon after a detention as may be with due diligence.[5] As to the time he is no insurer, but is liable only for default.[6] As to the way and the place at which the goods should be delivered, much must depend upon the nature of the goods, and much also

receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business, at the place of delivery, for and on account of the owner. When so delivered, the storehouse keeper becomes the bailee and agent of the owner in respect to such goods." And see Ostrander *v.* Brown, 15 Johns. 39; Hemphill *v.* Chenie, 6 W. & S. 62; Stone *v.* Waitt, 31 Maine, 409.

[1] See Duff *v.* Budd, 3 Br. & Bing. 177; Stephenson *v.* Hart, 4 Bing. 476.

[2] Eagle *v.* White, 6 Whart. 505. In this case the defendants, who were common carriers on the railroad from Philadelphia to Columbia, undertook to carry certain boxes of goods belonging to the plaintiff, from Philadelphia to Columbia. The cars arrived at the latter place about sunset on a Saturday evening, and, by direction of the plaintiffs, were placed on a sideling, the plaintiffs declined receiving the goods that evening, on the ground that it was too late; wherefore the agent of the defendants left the cars on the sideling, taking with him the keys of the padlocks with which the cars were fastened, and promised to return on Monday morning. The cars remained in this situation until Monday morning, when they were opened by the plaintiffs, by means of a key which fitted the lock; and, on examination, it was discovered that one of the boxes had been opened, and the contents carried away. *Held*, that the defendants were liable to the plaintiffs for the value of the goods lost. (*Huston*, J., dissenting.)

[3] Hill *v.* Humphreys, 5 W. & S. 123. In Merwin *v.* Butler, 17 Conn. 138, where the defendant, who was a common carrier, received from the plaintiff a package of money, to convey it from S. to P., and deliver it at the bank in P., it appeared that when the defendant arrived at P., the bank was shut; that he went twice to the house of the cashier, and not finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it, and that the defendant then refused to be further responsible for any loss or accident; it was *held* that, in the absence of any special contract, (none being proved in this case,) these facts did not constitute a legal excuse to the defendant for the non-performance of his undertaking. And see Young *v.* Smith, 3 Dana, 91; Storr *v.* Crowley, McL. & Y. 129.

[4] Thus, in Raphael *v.* Pickford, 6 Scott, N. R. 478, it appeared that a parcel had been delivered to the defendants in London, on the 8th of August, addressed to the plaintiff, at Birmingham, where it ought to have arrived on the 10th, but did not arrive until the 3d or 4th of September. It was held, upon this evidence, that the plaintiff was entitled to recover — the duty to deliver within a reasonable time being a term ingrafted by legal implication upon a promise or duty to deliver generally. And see Boyle *v.* M'Laughlin, 4 H. & J. 291; Erskine *v.* Thames, 6 Mis. 371; Hand *v.* Baynes, 4 Whart. 204.

[5] See Hadley *v.* Clarke, 8 T. R. 259, where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her "until the further order of council;" it was held that such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. And see Lowe *v.* Moss, 12 Ill. 477; Parsons *v.* Hardy, 14 Wend. 215.

[6] See Parsons *v.* Hardy, *supra;* Dows *v.* Cobb, 12 Barb. 310; Boyle *v.* M'Laughlin, 4 H. & J. 291; Hadley *v.* Clarke, 8 T. R. 259. But see, *contrà*, Harrell *v.* Owens, 1 Dev. & Bat. 273.

upon the usage in regard to them, if such usage exists.[1] They should be so left and with such notice as to secure the early, convenient, and safe reception of them by the person entitled to have them. Something also must depend, on this point, on the mode of conveyance. A man may carry a parcel into the house, and deliver it to the owner or his servant; a wagon or cart can go to the gate, or into the yard, and there deliver what it carries. A vessel can go to one wharf or another; and is bound to go to that which is reasonably convenient to the consignee, or to one that was agreed upon; but it is said he is not bound to comply with requirements of the consignee as to the very wharf the goods should be left at.[2] Where not delivered to the owner personally or to his agent, immediate notice should be given to the owner.[3] In fact it may be said the carrier cannot be made

[1] Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 16 Vt. 52, 18 id. 131, 23 id. 186, a strong case upon this point. The defendants were common carriers on Lake Champlain, from Burlington to St. Albans, touching at Port Kent and Plattsburgh, long enough to receive and discharge freight and passengers. This action was brought against them to recover for the loss of a package of bank-bills. It appeared in evidence that the package in question, which was directed to "Richard Yates, Esq., Cashier, Plattsburgh, N. Y.," was delivered by the teller of the plaintiffs' bank to the captain of the defendants' boat, which ran daily from Burlington to Plattsburgh, and thence to St. Albans, and that, when the boat arrived at Plattsburgh, the captain delivered the package to one Ladd, a wharfinger, and that it was lost or stolen while in Ladd's possession. No notice was given by the captain of the boat to the consignee of the arrival of the package, nor had he any knowledge of it until after it was lost. The principal question in the case was, whether the package was sufficiently delivered to discharge the defendants from their liability as carriers. The defendants offered evidence to show that a delivery to the wharfinger, without notice, under the circumstances of the case, was a good delivery according to their uniform usage, and the usage of other carriers similarly situated. The case was before the Supreme Court of Vermont three times, and that court, upon each occasion, held that, in the absence of any special contract, a delivery to the wharfinger without notice, if warranted by the usage of the place, was sufficient, and discharged the defendant from all liability. And see, also, Gibson *v.* Culver, 17 Wend. 305.

[2] See Chickering *v.* Fowler, 4 Pick. 371.

[3] In Kohn *v.* Packard, 3 Louis. 224, *Porter*, J., laid down the rule upon this subject thus: "We have the high authority of Chancellor Kent for saying that the better opinion is, there must be a delivery on the wharf to some person authorized to receive the goods, or some act which is equivalent to or a substitute for it. The contrary doctrine appears to us too repugnant to reason and justice to be sanctioned by any one who will follow it out to the consequences to which it inevitably leads. Persons to whom goods are sent, may be absent from the port when the ship reaches it; they may be disabled by sickness from attending to their business; they may not be informed of the arrival of the vessel. Under such circumstances, or many others similar that may be supposed, it would be extraordinary, indeed, if the captain were authorized to throw the goods on shore, where they could not fail to be exposed to injury from the weather, and would be liable to be stolen. There would be little difference in such an act and any other that would occasion their loss. Contracts impose on parties not merely the obligations expressed in them, but every thing which by law, equity, and custom is considered as incidental to the particular contract, or necessary to carry it into effect. La. Code, 1987. Delivery is not merely an incident to the contract of affreightment, it is essential to its discharge, and as there cannot be a delivery without the act of two parties, it

responsible, without a notice of delivery to him, unless the delivery is itself a notice, and so he cannot make adequate delivery without similar notice. But if the carrier has pointed out a place or way of delivery to himself, as at his station or in his box, he must take notice;[1] and if the owner has in any way designated how the goods may be delivered to himself, he is bound by it. The notice must be prompt, and distinct. And if the goods are delivered at an unsuitable or unauthorized place, no notice will make this a good delivery.[2]

Railroads terminate at their station, and although goods might be sent by wagons to the house or store of consignees, this is not usually done, as it is considered that the railroad carrier has finished his transit at his own terminus. Usually, the consignee of goods sent by railroad has notice from the consignor when to expect them; and this is so common that it is seldom necessary, in fact, for the agents of the railroad to give notice to the consignee. But this should, we think, be given where it is necessary; and should be given as promptly, directly, and specifically as may be necessary for the purpose of the notice. The law on this point, however, is not yet settled; nor will it be until it is determined by statute, by further adjudication, or by established and general usage.[3]

is indispensable the freighter should be apprised when and where the ship-owner, or his agent, is ready to hand over the goods." See also Chickering *v.* Fowler, *supra;* House *v.* The Schooner Lexington, 2 N. Y. Legal Observer, 4; Price *v.* Powell, 3 Comst. 322.

[1] See Merriam *v.* The Hartford, &c., Railroad Co. 20 Conn. 354.

[2] See Gatliffe *v.* Bourne, 4 Bing. N. C. 34, 3 M. & Gr. 643, 7 id. 850; Dixon *v.* Dunham, 14 Ill. 324.

[3] Until very recently there were no express decisions upon this point; and those that we now have are not harmonious in their views. Thus, in Michigan Central R. R. Co. *v.* Ward, 2 Mich. 538, it was held that common carriers by railroad are excused from a personal delivery of goods carried by them; but in lieu of delivery, are required to notify the consignee, and their liability as carriers continues until the consignee has had reasonable time to remove the property. And *Johnson*, J., said: "In the absence of any special contract, or local custom, or usage of particular trades, governing or controlling the action of the parties, it is incumbent upon a common carrier, by the rules of the common law, to deliver the goods intrusted to his care, to the consignee personally, and, until such delivery, he does not discharge himself from the obligations and duties the law imposes upon him. . . . But to this general rule there will be found many exceptions — it is competent for a party to discharge himself from this implied undertaking by a special contract, or by showing a local custom, or a particular usage, when such custom or usage is of such a character as fairly to raise the presumption that both of the contracting parties acted in reference to it. With great force and reason the law implies an exception to another large class of common carriers, including all those whose mode of transportation is such as to render it impracticable to comply with this rule; it embraces all carriers by ships and boats, and cars upon railroads. These must necessarily stop at the wharves and depots of their respective routes, and, consequently, personal delivery would be attended with great inconvenience, and

It may happen that some third party may claim the goods under a title adverse to that of the consignor or consignee. If the carrier refuse to deliver them to this third party, and it turns out that this claimant had a legal right to demand them, the carrier would be liable in damages to him.[1] But the carrier may and should demand full and clear evidence of the claimant's title; and if the evidence be not satisfactory, he may demand security and indemnity. If the evidence or the indemnity be withheld, he certainly should not be held answerable for any thing beyond that amount which the goods themselves would satisfy, for he is in no fault. If he delivers the goods to such claimant, proof that the claimant had good title, is an adequate defence against any suit by the consignor or consignee for non-delivery.[2]

therefore the law has dispensed with it. But in lieu of personal delivery, which is dispensed with in the last class of cases mentioned, the law requires a notice, and nothing will dispense with that notice. Price *v.* Powell, 3 Comst. 322. . . . It is useless to multiply authorities upon this point. There cannot be found, it is believed, a single case in the books to the contrary. The rule, then, seems to be this, that in all cases carriers by ships, and boats, and cars, who are exempt from the general doctrine of personal delivery, must in lieu thereof give notice to the consignee, and they are not discharged from their responsibility as such, until notice be given, and the consignee have a reasonable time to receive and remove his goods." Story on Bail. § 544. But in the case of Norway Plains Co. *v.* B. and M. R. R. 1 Gray, 263, it was *held* that the proprietors of a railroad, who transport goods over their road for hire, and deposit them in their warehouse without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars and placed in the warehouse; but are liable as warehousemen, only for want of ordinary care; although the owner or consignee has no opportunity to take the goods away before the fire. And *semble*, that the proprietors of a railroad are not obliged to give notice to the consignees of the arrival of goods, transported by them, in order to exonerate themselves from their liability as common carriers. And see Thomas *v.* B. and P. R. R. Co. 10 Met. 472; Richards *v.* The London, &c., Railway, 7 C. B. 839; Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 16 Vt. 52, 18 id. 131, 23 id. 186.

[1] Thus, in Wilson *v.* Anderton, 1 B. & Adol. 450, the captain of a ship, who had taken goods on freight and claimed to have a lien upon them, delivered them to a bailee. The real owner demanded them of the latter, but he refused to deliver them, without the directions of the bailor. *Held*, that the bailor not having any lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion. And Lord *Tenterden* said: "A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, or the bailor can give no better title than he has. The right to the property may, therefore, be tried in an action against the bailee, and a refusal like that stated in this case has always been considered evidence of a conversion. The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, must stand or fall by his title."

[2] King *v.* Richards, 6 Whart. 418. The defendants in this case were common carriers of goods between New York and Philadelphia, and had signed a receipt for certain goods as received of A, which they promised to deliver to his order. In trover by the indorsers of this paper, who had made advances on the goods, it was held that the defendants might prove that A had no title to the goods that they had been fraudulently obtained

SECTION IV.

OF THE LIEN OF THE COMMON CARRIER.

By "lien," which is a Norman-French word frequently used in law, is meant a bond or something which fastens one thing to another. The legal meaning of this word, which we have had occasion to use in preceding chapters, is the right of holding or detaining property until some charge against it, or some claim upon the owner, on account of it, is satisfied.

The common carrier has this right against all the goods he carries, for his compensation.[1] While he holds them for this purpose, he is not liable for loss or injury to them as a common carrier; that is, not unless for his own default.

He may not only hold the goods for his compensation, but may recover this out of them, by any of the usual means in which a lien upon personal chattels is made productive.[2]

If a carrier carries goods for and at the request of a party who does not own them, and at the end of the transit the true owner discovers or interposes and claims them, the carrier might recover his fare if he had rendered a certain service or benefit to the owner by conveying the goods, which service or benefit the owner accepted by there receiving the goods. But it would be a personal claim only for which he would have no lien. This at least, is the conclusion to which we think the common principles of the law of bailment would lead.[3]

by him from the true owner; and that, upon demand, they had delivered them up to the latter. And in Bates *v.* Stanton, 1 Duer, 79, the same doctrine was held.

[1] This was held as early as Skinner *v.* Upshaw, 2 Ld. Raym. 752, and has been followed ever since. For the American cases recognizing this doctrine, see Hayward *v.* Middleton, 1 So. Car. Const. Reps. 186; Ellis *v.* James, 5 Ohio, 88; Hunt *v.* Haskell, 24 Maine, 339; Bowman *v.* Hilton, 11 Ohio, 303.

[2] Fox *v.* McGregor, 11 Barb. 41; Hunt *v.* Haskell, 24 Maine, 339. If the carrier once voluntarily part with the possession of the goods, he loses his lien upon them, and is not authorized by law to reclaim them. See Forth *v.* Simpson, 13 Q. B. 680; Bailey *v.* Quint, 22 Vt. 474; Bigelow *v.* Heaton, 6 Hill, 43, 4 Denio, 496. But if the consignee induce the carrier to part with the possession of the goods by false and fraudulent representations, such delivery will not amount to a waiver of the lien. Bigelow *v.* Heaton, *supra*. So a lien may be created and retained after delivery, by agreement of the parties. Sawyer *v.* Fisher, 32 Maine, 28.

[3] In Yorke *v.* Grenaugh, 2 Ld. Raym. 866, (approved in King *v.* Richards, 6 Whart. 423.) a carrier's lien, under somewhat similar circumstances, was maintained. In Fitch *v.* Newberry, 1 Doug. (Mich.) 1, it is denied. So it is in Van Buskirk *v.* Parinton, 2 Hall, 561. And in Robinson *v.* Baker, 5 Cush. 137. See also Collman *v.* Collins, 2 Hall, 569.

SECTION V.

OF THE LIABILITY OF THE COMMON CARRIER.

This is perfectly well established as a rule of law, although it is very exceptional and peculiar. It is sometimes said to arise from the public carrier being a kind of public officer. But the true reason is the confidence which is necessarily reposed in him, the power he has over the goods intrusted to him, the ease with which he may defraud the owner of them, and yet make it appear that he was not in fault, and the difficulty which the owner might find in making out proof of his default. This reason it is important to remember, because it helps us to construe and apply the rules of law on this subject. Thus, the rule is that the common carrier is liable for any loss or injury to goods under his charge, unless it be caused by the act of God, or by the public enemy.[1] And this phrase, "the act of God," has been said to mean the same thing as "inevitable (or unavoidable) accident."[2] But this is a mistake. The rule is intended to hold the common carrier responsible wherever it was possible that he caused the loss either by negligence or design. Hence, the act of God means some act in which neither the carrier himself, nor any other man, had any direct and immediate agency.[3] If, for example, a house in which the goods are at night, is struck with lightning, or blown over by a tempest, or washed away by inundation, the carrier is not liable. This is an act of God, although man's agency interferes in causing the loss, for without that agency, the goods would not have been there. But no man could have directly caused the loss. On the other hand, if the building was set on fire by an incendiary at midnight, and the

[1] This has been the rule of the common law for ages. See Woodlefe *v.* Curties, 1 Rol. Abr. 2, Co. Litt. 89, a; S. C. *nom.* Woodlife's case, Moore, 462; Lord *Holt*, in Coggs *v.* Bernard, 2 Ld. Raym. 909. See also Proprietors of Trent Navigation *v.* Wood, 3 Esp. 127, 4 Doug. 290; Forward *v.* Prittard, 1 T. R. 27; Chevallier *v.* Straham, 2 Texas, 115; Mershon *v.* Hobensack, 2 N. J. 372; Friend *v.* Woods, 6 Grattan, 189.

[2] See Walpole *v.* Bridges, 5 Blackf. 222; Fish *v.* Chapman, 2 Geo. 349; Neal *v.* Saunderson, 2 Sm. & M. 572.

[3] Lord *Mansfield*, in Proprietors of Trent and Mersey Navigation Co. *v.* Wood, 3 Esp. 131, 4 Doug. 290, says: "The act of God is natural necessity, as winds and storms, which arise from natural causes, and is distinct from inevitable accident." And see McArthur *v.* Sears, 21 Wend. 190; Jeremy on Carriage, 57.

rapid spread of the flames made it absolutely impossible to rescue the goods, this might be an inevitable accident if the carrier were wholly innocent, but it would also be possible that the incendiary was in collusion with the carrier for the purpose of concealing his theft; and, therefore, the carrier would be liable without showing that this was the case. As a general rule, the common carrier is always liable for loss by fire, unless it be caused by lightning;[1] and this rule has been applied to steamboats.[2] So, it may be true that after the lightning, the tempest, or inundation, the carrier was negligent, and so lost the goods which might have been saved by proper efforts, or that he took the opportunity to steal them. If this could be shown, the carrier would, of course, be liable; but the law will not presume this, if the first and main cause were such that the carrier could not have been guilty in respect to it. So, a common carrier would be liable for a loss caused by a robbery, however sudden, unexpected, and irresistible, or by a theft, however wise and full his precautions, and however subtle and ingenious the theft,[3] although either of these might seem to be "inevitable;" that is, unavoidable by any means of safety which it would be at all reasonable to require.[4]

[1] Thus, in Forward *v.* Prittard, 1 T. R. 27, the plaintiff's goods, while in the possession of the defendant as a common carrier, were consumed by fire. It was found that the accident happened without any actual negligence in the defendant, but that the fire was not occasioned by lightning. Under these circumstances, the Court of King's Bench held the defendant liable. And Lord *Mansfield* said: "A carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God or the king's enemy. Now, what is the act of God? I consider it to mean something in opposition to the act of man; for every thing is the act of God that happens by his permission; every thing by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, namely, that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil. In this case it does not appear but that the fire arose from some act of man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier, therefore, in this case is liable, inasmuch as he is liable for inevitable accident." And see Thorogood *v.* Marsh, Gow, 105; Parker *v.* Flagg, 26 Maine, 181; Hale *v.* N. J. Steam Navigation Co. 15 Conn. 539; Chevallier *v.* Straham, 2 Texas, 115; Parsons *v.* Monteath, 13 Barb. 353.

[2] See Gilmore *v.* Carman, 1 S. & M. 279.

[3] See Coggs *v.* Barnard, 2 Ld. Raym. 909; Forward *v.* Pittard, 1 T. R. 27.

[4] See, in addition to the cases already cited, Ewart *v.* Street, 2 Bailey, 157; Fish *v.* Chapman, 2 Geo. 349; McArthur *v.* Sears, 21 Wend. 190; Backhouse *v.* Sneed, 1 Murphy, 173. The act of God, in order to excuse the common carrier for the loss,

The act of God may be negative merely, as if a vessel be wrecked from a failure of wind.[1] So it includes whatever loss springs from the inherent nature of the thing; as its fermentation or decay; always provided the carrier took all reasonable precautions, in respect of stowage, exposure, and the like, to prevent this.[2] For whatever the direct and principal cause of injury may be, if the negligence or default of the carrier substantially mingles with it, he is responsible.[3]

The general principles of agency extend to common carriers, and make them liable for the acts of their agents, done while in the discharge of the agency or employment. So, the knowledge of his agent is his own knowledge, if the agent be authorized ex-

must be the immediate and not the remote cause of the loss. Smith *v.* Shepherd, Abbott on Shipping, 385, (5th Am. ed.) This was an action brought against the master of a vessel navigating the River Ouse and Humber from Selby to Hull, by a person whose goods had been wet and spoiled. At the trial it appeared in evidence that at the entrance of the harbor at Hull, there was a bank on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep, instead of shelving towards the river; that a few days after this flood a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel; and the defendant, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe had the bank remained in its former situation; but on the tide ebbing, her stern sunk into the water, and the goods were spoiled; upon which the defendant tendered evidence to show that there had been no actual negligence. *Heath*, J., before whom the case was tried, rejected the evidence, and ruled that the act of God, which could excuse the defendant, must be immediate; but this was too remote; and directed the jury to find a verdict for the plaintiff, and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction of the learned judge at the trial. In Smyrl *v.* Niolon, 2 Bailey, 421, it was held that a loss caused by a boat's running on an unknown "snag" in the usual channel of the river, is referable to the act of God. And see Williams *v.* Grant, 1 Conn. 487; Faulkner *v.* Wright, Rice, 107. But in Friend *v.* Woods, 6 Gratt. 189, it was *held* that, where a common carrier strands his boat upon a bar recently formed in the channel of the river, of the existence of which he was previously ignorant, he is liable for the damage done to the freight on board his boat.

[1] Thus, in Colt *v.* M'Mechen, 6 Johns. 160, where a vessel was beating up the Hudson against a light and variable wind, and being near shore, and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk, it was held that the sudden failure of the wind was the act of God, and excused the master; there being no negligence on his part. And *Spencer*, J., said: "The case of Amies *v.* Stevens, 1 Strange, 128, shows that a sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven against a pier and overset, by the violence of the shock, has been adjudged to be the act of God, or *vis divina*. The sudden gust in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow, in the one case; and in the other the wind was stayed by him."

[2] See Warden *v.* Greer, 6 Watts, 424; Leech *v.* Baldwin, 5 Watts, 446; Clark *v.* Barnwell, 12 How. 272; Farrar *v.* Adams, Bul. N. P. 69.

[3] See Williams *v.* Branson, 1 Murph. 417; Williams *v.* Grant, 1 Conn. 487; Clark *v.* Barnwell, 12 How. 272; Campbell *v.* Morse, Harper, 468. And see Amies *v.* Stevens, 1 Strange, 128.

pressly or by the nature of his employment, to receive this knowledge.[1] But an agent for a common carrier may act for himself,— as a stage coachman in carrying parcels for which he is paid personally, and does not account with his employer, — and then the employer is not liable,[2] unless the owner of the goods supposed the stage coachman carried the goods for his employer, and was justified by the facts and apparent circumstances in so believing.[3]

A carrier may be liable beyond his own route. It is very com-

[1] In Burrell *v.* North, 2 Car. & Kir. 680, in an action against a carrier for the loss of a parcel, the defendant pleaded that it was not delivered to him to be carried; it was held sufficient for the plaintiff to show that it was delivered to a person and at a house where parcels were in the habit of being left for this carrier. And see Davey *v.* Mason, 1 Car. & M. 45; D'Anjou *v.* Deagle, 3 H. & J. 206.

[2] See Bean *v.* Sturtevant, 8 N. H. 146. In Chouteau *v.* Steamboat St. Anthony, 16 Missouri, 216, it was held that, in order to make the owners of a steamboat, who were common carriers, liable for the act of the captain in taking money for transportation, it must be shown that it was within the scope of the usual employment and service of the boat for the captain to carry packages of money for hire, on account of the owners. If the captain carries them on his own account and responsibility, the owners are not liable. And see King *v.* Lenox, 19 Johns. 235; Butler *v.* Basing, 2 C. & P. 613; Walter *v.* Brewer, 11 Mass. 99; Allen *v.* Sewall, 2 Wend. 327; Reynolds *v.* Toppan, 15 Mass. 370; Citizens' Bank *v.* Nantucket Steamboat Co. 2 Story, 16.

[3] See Bean *v.* Sturtevant, *ubi supra*. This subject was well considered in Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 23 Vt. 186. See the facts of the case stated *ante*, p. 209, n. 1. One of the points made was, whether or not the defendants were common carriers as to the bank-bills in question. Upon this point, *Redfield*, J., said: "It seems to us that when a natural person, or a corporation whose powers are altogether unrestricted, erect a steamboat, appoint a captain, and other agents, to take the entire control of their boat, and thus enter upon the carrying business, from port to port, they do constitute the captain their general agent, to carry all such commodities as he may choose to contract to carry, within the scope of the powers of the owners of the boat. If this were not so, it would form a wonderful exception to the general law of agency, and one in which the public would not very readily acquiesce. There is hardly any business in the country, where it is so important to maintain the authority of agents, as in this matter of carrying, by these invisible corporations, who have no local habitation, and no existence or power of action, except through these same agents, by whom almost the entire carrying business of the country is now conducted. If, then, the captains of these boats are to be regarded as the general agents of the owners, — and we hardly conceive how it can be regarded otherwise, whatever commodities, within the limits of the powers of the owners, the captains, as their general agents, assume to carry for hire, the liability of the owners as carriers is thereby fixed, and they will be held responsible for all losses, unless from the course of business of these boats, the plaintiffs did know, or upon reasonable inquiry might have learned, that the captains were trusted with no such authority. *Primâ facie* the owners are liable for all contracts for carrying, made by the captains or other general agents for that purpose, within the powers of the owners themselves, and the *onus* rests upon them to show that the plaintiff had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. But it does not appear to us that the mere fact that the captain was, by the company, permitted to take the perquisites of carrying these parcels, will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank-bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves." And see Allen *v.* Sewall, 2 Wend. 327, 6 id. 335; Hosea *v.* McCrory, 12 Ala. 349.

mon for carriers who share between them the parts of a long route, to unite in the business and the profits, and then all are liable for a loss on any part of the route.[1] If they are not so united in fact, but seem to be so, and justify a sender in supposing they are united, they are equally liable.[2] But if a carrier takes goods to carry as far as he goes, and then engages to send them forward by another carrier, he is liable as carrier to the end of his own route; he is liable also if he neglects to send the goods on; but he is not liable for what may happen to them afterwards.[3] Thus far the law is quite settled. And it seems to be the rule in England that, if a carrier takes goods which are marked or otherwise designated to go to a place beyond his own route, it will be presumed that he agrees to carry them thither, and that he has made arrangements for that purpose, which affect him with the liability of a carrier through the whole route,[4]

[1] Thus, where an association was formed between shippers, on Lake Ontario, and the owners of canal boats on the Erie Canal, for the transportation of goods and merchandise between the city of New York and the ports and places on Lake Ontario and the River St. Lawrence, and a contract was entered into by the agent of such association, for the transportation of goods from the city of New York to Ogdensburgh, on the River St. Lawrence, and the goods were lost on Lake Ontario; it was *held* that *all* the defendants were answerable for the loss, although *some* of them had no interest in the vessel navigating the lake, in which the goods were shipped. Fairchild *v.* Slocum, 19 Wend. 329. See also Fromont *v.* Coupland, 2 Bing. 170; Helsby *v.* Mears, 5 B. & C. 504.

[2] Thus, where A and B were jointly interested in the profits of a common stage-wagon, but, by a private agreement between themselves, each undertook the conducting and management of the wagon, with his own drivers and horses, for specified distances, it was *held* that, notwithstanding this private agreement, they were jointly responsible to third persons for the negligence of their drivers throughout the whole distance. Waland *v.* Elkins, 1 Stark. 272; S. C. *nom.* Weyland *v.* Elkins, Holt, N. P. 227. And see Weed *v.* The S. and S. Railroad Co. 19 Wend. 534.

[3] See Garside *v.* Trent and Mersey Navigation Co. 4 T. R. 581; Ackley *v.* Kellogg, 8 Cow. 223.

[4] See Muschamp *v.* The L. and P. Junction Railway Co. 8 M. & W. 421, the leading English case upon this subject. In this case the defendants were the proprietors of the Lancaster and Preston Junction Railway, and carried on business on their line between Lancaster and Preston, as common carriers. At Preston, the defendants' line joined that of the North Union Railway. The plaintiff, a stone mason, living at Lancaster, had gone into Derbyshire in search of work, leaving his box of tools to be sent after him. His mother, accordingly, took the box to the railway station at Lancaster, directed to the plaintiff at a place beyond Preston, in Derbyshire, and requested the clerk at the station to book it. She offered to pay the carriage in advance for the whole distance, but was told by the clerk that it had better be paid at the place of delivery. It appeared that the box arrived safely at Preston, but was lost after it was dispatched from thence by the North Union Railway. The plaintiff brought this action to recover for the loss of the box. *Rolfe*, B., before whom the cause was tried, stated to the jury, in summing up, that, where a common carrier takes into his care a parcel directed to a particular place, and does not, by positive agreement, limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of carrier. And upon a motion for a new trial, the Court of Exchequer

unless he can show that the fact is otherwise, and that the sender understood him differently, or had good reason so to understand him.[1] But in this country, according to the weight of recent authority, a common carrier will not be held liable, as such, beyond his own route, without evidence of a distinct contract to that effect; and the mere fact of his receiving a package directed to a place beyond his route, will not be sufficient evidence for that purpose.[2]

SECTION VI.

OF THE CARRIER OF PASSENGERS.

The carriers of passengers are under a more limited liability than the carriers of goods. This is now well settled.[3] The

held the instructions to be correct. And see, to the same effect, Watson *v.* The A., N., and B. Railway Co. 3 Eng. Law and Eq. 497. See also, Fowles *v.* The Great Western Railway Co. 16 Eng. Law and Eq. 531; Scotthorn *v.* The South Staffordshire Railway Co. 18 id. 553; Wilson *v.* The Y. N. and B. Railway Co. 18 id. 557, n. (1.)

[1] See cases in preceding note.

[2] Thus, in the recent case of Nutting *v.* Conn. River R. R. Co. 1 Gray, 502, it was held that a railroad corporation, receiving goods for transportation to a place situated beyond the line of their road, on another railroad which connects with theirs, but with the proprietors of which they have no connection in business, and taking pay for the transportation over their own road only, are not liable, in the absence of any special contract, for the loss of the goods, after their delivery to the proprietors of the other railroad. And *Metcalf*, J., said: "The plaintiff's counsel relied on the case of Muschamp *v.* L. and P. Junction Railway, 8 M. & W. 421, in which it was decided, by the Court of Exchequer, that, when a railway company take into their care a parcel directed to a particular place, and do not, by positive agreement, limit their responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that place be beyond the limits within which the company, in general, profess to carry on their business of carriers. And two justices of the Queen's Bench subsequently made a like decision. Watson *v.* A. N. and B. Railway, 3 Eng. Law and Eq. 497. We cannot concur in that view of the law; and we are sustained, in our dissent from it, by the Court of Errors in New York, and by the Supreme Courts of Vermont and Connecticut. Van Santvoord *v.* St. John, 6 Hill, 157; Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 18 Vt. 140, and 23 Vt. 209; Hood *v.* New York and New Haven R. R. 22 Conn. 1. In these cases, the decision in Weed *v.* Saratoga and Schenectady Railroad, 19 Wend. 534, (which was cited by the present plaintiff's counsel,) was said to be distinguishable from such a case as this, and to be reconcilable with the rule that each carrier is bound only to the end of his route, unless he makes a special contract that binds him further." And see further, 1 Parsons on Contracts, 687, n. (k.)

[3] This distinction was recognized as early as the case of Aston *v.* Heavan, 2 Esp. 533. That was an action against the defendants, as proprietors of a stage-coach, to recover damages received by the plaintiff in consequence of the upsetting of the defendant's coach. The defence relied upon was, that the coach was driving at a regular pace on the Hammersmith road, but that on the side was a pump of considerable height, from whence the water was falling into a tub below; that the sun shone brightly, and being reflected strongly from the water, the horses had taken fright and run against the bank at the opposite side, where the coach was overset. And *Eyre*, C. J., said: "This action is founded entirely on negligence. It has been said, by the counsel for the

reason is, that they have not the same control over passengers as over goods; cannot fasten them down, and use other means of securing them. Hence, the distinction applies to the carriage of slaves; for, while they are in some respects property, they are also possessed of the same power and right of locomotion as other men.[1] But, while the liability of the carrier of passengers is thus mitigated, it is still stringent and extreme. No proof of care will excuse the carrier if he loses goods committed to him. But proof of the utmost care will excuse him for injury done to passengers. Some of the authorities, and, as we think, the reason of the case, would justify us in saying that the carrier of passengers is liable for injury to them, unless he can show that he took

plaintiff, that wherever a case happens, even where there has been no negligence, he would take the opinion of the court whether defendants, circumstanced as the present, that is, coach-owners, should not be liable in all cases, except where the injury happens from the act of God or the King's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike. When that case does occur, he will be told that carriers of goods are liable by the custom, to guard against frauds they might be tempted to commit by taking goods intrusted them to carry, and then pretending they had lost or been robbed of them; and because they can protect themselves; but there is no such rule in the case of the carriage of the persons. This action stands on the grounds of negligence only." To the same effect is Christie *v.* Griggs, 2 Camp. 79. That was an action of *assumpsit* against the defendant, as owner of the Blackwall stage, on which the plaintiff was travelling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second to the insufficiency of the axletree of the carriage. The defendant introduced evidence to show that the axletree had been examined a few days before it broke, without any flaw being discovered in it; and that, when the accident happened, the coachman, a very skilful driver, was driving in the usual track, and at a moderate pace. *Mansfield*, C. J., in summing up to the jury, said: "As the driver has been cleared of everything like negligence, the question for the jury will be as to the sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant is not liable. There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant the safety of the passengers. This undertaking as to them goes no further than this, that, as far as human care and foresight can go, he will provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff has no remedy for the misfortune he has encountered." The same rule has been repeatedly declared, in subsequent cases, both in this country and in England. See Harris *v.* Costar, 1 C. & P. 636; White *v.* Boulton, Peake's Cas. 81; Crofts *v.* Waterhouse, 3 Bing. 319; Derwort *v.* Loomer, 21 Conn. 245; Fuller *v.* The Naugatuck R. R. Co. 21 Conn. 557; Hall *v.* Conn. River Steamboat Co. 13 Conn. 319; McKinney *v.* Neil, 1 McLean, 540; Maury *v.* Talmadge, 2 McLean, 157; Stokes *v.* Saltonstall, 13 Pet. 181; Stockton *v.* Frey, 4 Gill, 406; Camden and Amboy R. R. Co. *v.* Burke, 13 Wend. 626; Hollister *v.* Nowlen, 19 Wend. 236; Caldwell *v.* Murphy, 1 Duer, 233.

[1] Boyce *v.* Anderson, 2 Pet. 150. This was an action brought by the owner of slaves, against the proprietors of a steamboat, on the Mississippi River, to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the captain and commandant of the boat. The court below instructed the jury "that the doctrine of common carriers did not apply to the case of carrying intelligent beings, such as negroes;" and the Supreme Court held such instruction correct. And see Clark *v.* McDonald, 4 McCord, 223; Williams *v.* Taylor, 4 Porter, 234.

all possible care, — giving always a reasonable construction to this phrase.[1]

SECTION VII.

OF A NOTICE BY THE CARRIER, RESPECTING HIS LIABILITY.

It is now settled — though formerly denied — that the common carrier has a right to make a special agreement with the senders of goods, which shall materially modify, or even wholly prevent his liability for accidental loss or injury to the goods.[2] Whether

[1] See Hegeman *v.* Western Railroad Corp. 16 Barb. 353; and cases *supra.* In Ware *v.* Gay, 11 Pick. 106, it was held that if, in an action by a passenger against the proprietors of a stage-coach for an injury occasioned by the insufficiency of the coach, the plaintiff proves that, while the coach was driven at a moderate rate upon a plain and level road, without coming in contact with any other object, one of the wheels came off, and the coach overset, whereby the plaintiff was hurt, the law will imply negligence, and the burden of proof will rest upon the defendants to rebut this legal inference, by showing that the coach was properly fitted out and provided. And see, to the same effect, Christie *v.* Griggs, *supra;* Carpue *v.* The L. and B. Railway Co. 5 Q. B. 747; Skinner *v.* Brighton and Southcoast Railway Co. 2 Eng. Law and Eq. 360; Stokes *v.* Saltonstall, 13 Pet. 181; Stockton *v.* Frey, 4 Gill, 406; McKinney *v.* Neil, 1 McLean, 540.

[2] In England, no question is ever made as to the validity of such a contract, and although there are few, if any, cases where the point was expressly adjudged, yet in all the cases such was assumed to be the law. Nor until the case of Cole *v.* Goodwin, 19 Wend. 251, was the validity of such a contract ever denied in this country. In that case, which was an action against the defendants as common carriers, the only question was, whether a notice published by them, that all baggage conveyed over their line would be at the risk of the owners, such notice having been brought home to the knowledge of the plaintiff, would discharge the defendants from their common-law liability. It was held that it should not; and *Cowen*, J., in the opinion delivered by him, insisted that common carriers, from their public employment, owe duties at common law from which public policy demands that they should not be discharged, and that, consequently, they cannot limit their common-law liability even by express agreement. And in Jones *v.* Voorhees, 10 Ohio, 145, although this question was not directly involved in the decision, the court intimated a strong inclination to adopt the views of Mr. Justice Cowen. In Gould *v.* Hill, 2 Hill, 623, the question as to the validity of such a contract was directly before the court. In that case the defendants, who were common carriers, on receiving goods for transportation, gave the owner a memorandum by which they promised to forward the goods to their place of destination, danger of fire, &c., excepted. And *Cowen*, J., who delivered the opinion of the court, referring to his opinion in Cole *v.* Goodwin, *supra*, held that common carriers could not limit their liability as such by an express agreement or special acceptance of the goods to be transported; and that, therefore, the defendants were liable for loss of the goods by fire while in their possession, though not resulting from negligence. *Nelson*, C. J., dissented. With the exception of Fish *v.* Chapman, 2 Geo. 349, we are not aware that the case of Gould *v.* Hill has ever been sanctioned by any court in this country. On the contrary, the Supreme Court of the United States, in New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 How. 344, expressly deny the doctrine of Gould *v.* Hill, and hold such a contract to be valid. *Nelson*, J., said: "As the extraordinary duties annexed to his employment, concern only, in the particular instance, the parties to the transaction, involving simply rights of property, — the safe custody and delivery of the goods, — we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it, than exist in the case of any other insurer of goods, to which his

he could make such a bargain with his passengers, to prevent his liability for injury to their persons, is much more doubtful. The question does not seem to have come directly before the courts. And although the language used to express the carrier's rights is sometimes broad enough to extend to the persons or passengers as well as to their goods, we think it open to doubt whether this was meant, or would be generally admitted as law. And if it were admitted, we should expect the carrier held to stricter proof and of a more definite bargain with regard to persons, than might

obligation is analogous; and which depends altogether upon the contract between the parties. The owner, by entry into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence." Since that time, Gould *v.* Hill has been expressly overruled in New York, by the Court of Appeals. Dorr *v.* N. J. Steam Navigation Co. 4 Sandf. 136, 1 Kernan, 485. This was an action against the defendants, as common carriers upon Long Island Sound, between New York and Stonington, to recover damages for the loss of goods. The declaration stated that the plaintiffs, merchants in New York, shipped the goods in question on board the steamer Lexington, in the defendants' line, to be carried to Stonington; that on the same evening, the steamer was consumed by fire on her passage, and the plaintiffs' goods destroyed. The defendants pleaded that the goods in question were received by them under a special contract, by reason of a clause and notice inserted in their bill of lading, which was set forth in the plea, and contained, among other things, that the goods in question were to be transported to Stonington; danger of fire, &c., excepted. The plea then averred that the liability of the defendants was restricted by the exception of the casualties mentioned in the bill of lading, and that the loss in question was occasioned by one of the excepted casualties, and was without the fault or negligence of the defendants. Upon a demurrer to this plea, the Superior Court of the city of New York gave judgment for the defendants. The case was afterwards carried to the Court of Appeals, where the judgment of the Superior Court was affirmed. *Parker*, J., in delivering the opinion of the Court of Appeals, said: "The plaintiffs rely upon the case of Gould *v.* Hill, 2 Hill, 623. It was there broadly decided, by a majority of the late Supreme Court, Chief Justice Nelson dissenting, that common carriers could not limit their liability, or evade the consequences of a breach of their legal duties, as such, by an express agreement or special acceptance of the goods to be transported. That decision rested upon no earlier adjudication in this State, though the question had been previously discussed and *obiter* opinions sometimes expressed upon it by judges; in deciding the question whether the common carrier could lessen the extent of his liability, by notice. But the case of Gould *v.* Hill has been deliberately overruled by the present Supreme Court, in two carefully considered cases, namely, Parsons *v.* Monteath, 13 Barb. 353; and Moore *v.* Evans, 14 id. 524. In both those cases the question is examined with much ability, and I think the unsoundness of the conclusion in Gould *v.* Hill, most satisfactorily shown. I am not aware that Gould *v.* Hill has been followed in any reported case. In Wells *v.* The Steam Navigation Co. 2 Comst. 209, *Bronson*, J., who seems to have concurred with Judge *Cowen* in deciding Gould *v.* Hill, speaks of the question as being still, perhaps, a debatable one." And see Stoddard *v.* The Long Island R. R. Co. 5 Sandf. 180; Mercantile Mutual Ins. Co. *v.* Chase, 1 E. D. Smith, 115; 1 Parsons on Con. 703, n. (d.) It should be observed that the Supreme Court of Michigan, in the recent case of Michigan Central R. R. Co. *v.* Ward, 2 Mich. 538, held that the rule we are now considering did not apply to the plaintiffs, on the ground that their charter is in the nature of a contract between the company and the State, permanently binding upon each, and the principal engagement on the part of the company, is, that they shall become, and continue to remain, common carriers. Their liability as common carriers, consequent upon the contract, and the law appertaining thereto, becomes irrevocably fixed; and, therefore, they cannot alter or modify this liability by any stipulation or contract.

suffice as to goods. The principal question is, what constitutes such a bargain. It seems to be well settled, by the weight of authority in this country, that a mere notice that the carrier is not responsible, or his refusal to be responsible, although brought home to the knowledge of the other party, does not necessarily constitute an agreement.[1] The reason is this. The sender has a right to insist upon sending his goods, and the passenger has a right to insist upon going himself, and leave the carrier to his legal responsibility; and the carrier is bound to take them on these terms. If, therefore, the sender or the passenger, after receiving such notice, only sends or goes in silence, and without expressing any assent, especially if the notice be given at such time or under such circumstances as would make it inconvenient for the sender not to send, or for the passenger not to go, then the law will not presume from his sending or going an assent to the carrier's terms.

But the assent may be expressed by words, or made manifest by acts; and it is a question of evidence for the jury whether there was such an agreement.

It seems to be conceded also, that a notice by the carrier, which only limits and defines his liability to a reasonable extent, as one which states what kind of goods he will carry, and what he will not; or to what amount only he will be liable for passen-

[1] It was held in England, prior to the passage of the statute of 11 Geo. IV., and 1 Will. IV. c. 68, commonly called the Carriers' Act, that such notices were valid, and the sender of goods was bound by their terms, although some of the courts regretted that such was the rule. See Maving *v.* Todd, 1 Stark. 72; Ellis *v.* Turner, 8 T. R. 531; Lyon *v.* Mells, 5 East, 428; Evans *v.* Soule, 2 M. & S. 1; Leeson *v.* Holt, 1 Stark. 186. The Carriers' Act, above referred to, put an end to this question. In this country, the courts have generally adopted the rule as stated in the text; as in Cole *v.* Goodwin, 19 Wend. 251, and Hollister *v.* Nowlen, id. 234. In both these cases the defendants were coach-proprietors, and had published notices to the effect that all baggage sent by their lines would be at the risk of the owners. The Supreme Court of New York declared that such notices were of no avail, and that the defendants were subject to their common-law liability. In the latter case, *Cowen*, J., delivering the opinion, held, as we have seen, that such notices were invalid, and that even a special agreement would not avail the defendants in such case. In the former case, *Bronson*, J., held that such notice did not amount to a special contract. And the following cases hold the same doctrine. Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 23 Vt. 186, per *Redfield*, J.; Clark *v.* Faxton, 21 Wend. 153; New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 344; Moses *v.* Boston and Maine R. R. 4 Foster, 71; Fish *v.* Chapman, 2 Geo. 349; Stoddard *v.* Long Island Railway Co. 5 Sandf. 180; Parsons *v.* Monteath, 13 Barb. 353; Dorr *v.* New Jersey Steam Navigation Co. 4 Sandf. 136, 1 Kernan. 485. The following cases, however, hold, although with apparent reluctance, that such notices are binding. See Sager *v.* The Portsmouth, &c., Railroad Co. 31 Maine, 228; C. and A. Railroad Co. *v.* Baldauf, 16 Penn. St. 67; Laing *v.* Colder, 8 Barr, 479; Bingham *v.* Rogers, 6 W. & S. 500.

gers' baggage, without special notice; or what information he will require, if certain articles, as jewels or gold, are carried, or what increased rates must be paid for such things, — any notice of this kind, if in itself reasonable and just, will bind the party receiving it.[1]

But no party will be affected by any notice, — neither the carrier, nor a sender of goods, nor a passenger, — unless a knowledge of it can be brought home to him.[2] But this may be done by indirect evidence. As by showing that it was stated on a receipt given to him, or on a ticket sold him, or in a newspaper which he actually read, or, perhaps, in one which he was in the habit of reading, or even that it was a matter of usage and generally known.[3] This question is one of fact, which the jury will determine upon all the evidence, under the direction of the court.

[1] This was decided in Nicholson *v.* Willan, 5 East, 507. There the defendant was a coach proprietor, and had published a notice, the purport of which was that he would not be accountable for any package whatever, (if lost or damaged,) above the value of £5, unless insured and paid for at the time of delivery. The action was brought to recover for the loss of a parcel delivered to the defendant to carry, containing goods to the value of £58. No disclosure was made of the true value of the parcel, nor was any extra freight paid; and the court *held* that the defendant was protected by his notice. And in the English courts, from this time to the passage of the Carriers' Act, effect was given to similar notices. See Harris *v.* Packwood, 3 Taunt. 264; Buck *v.* Evans, 16 East, 244; Levi *v.* Waterhouse, 1 Price, 280; Bodenham *v.* Bennett, 4 Price, 31; Smith *v.* Horne, 8 Taunt. 144; Birkett *v.* Willan, 2 B. & Ald. 356; Batson *v.* Donovan, 4 B. & Ald. 21; Sleat *v.* Fagg, B. & Ald. 342; Duff *v.* Budd, 3 Brod. & Bing. 177; Marsh *v.* Horne, 5 B. & Cr. 322; Brooke *v.* Pickwick, 4 Bing. 218; Riley *v.* Horne, 5 Bing. 218; Bradley *v.* Waterhouse, Mood. & M. 154. In this country, very few cases have been decided upon notices of this nature. In Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 23 Vt. 186, *Redfield,* J., says: "We regard it as well settled that the carrier may, by general notice brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance paid, beyond the mere expense of carriage." And dicta to the same effect may be found in the following cases. Bean *v.* Green, 3 Fairf. 422; Orange County Bank *v.* Brown, 9 Wend. 115; Cole *v.* Goodwin, 19 Wend. 251, per *Cowen,* J.

[2] See Hollister *v.* Nowlen, *ubi supra;* Brooke *v.* Pickwick, 4 Bing. 218. In Camden and Amboy Railroad Co. *v.* Baldauf, 16 Penn. St. 67, where the notice was in the English language, and the passenger was a German, who did not understand English, it was held incumbent on the carrier to prove that the passenger had actual knowledge of the limitation in the notice. And see Beckman *v.* Shouse, 5 Rawle, 189; Kerr *v.* Willan, 2 Stark. 53; Clayton *v.* Hunt, 3 Campb. 27.

[3] Thus, in Whitesell *v.* Crane, 8 W. & S. 369, it was *held* that the contents of notices restricting the liability of a line of public coaches, was sufficiently made known to passengers by being posted up at the place where they book their names. And see Hollister *v.* Nowlen, *supra;* Story on Bailments, § 558; 2 Stark. on Ev. 338; Harris *v.* Packwood, 3 Taunt. 264; Garnett *v.* Willan, 5 B. & Ald. 53; Duff *v.* Budd, 3 Brod. & Bing. 177. But the carrier is generally held to very strict proof that the bailee had knowledge of the notice. See the very strong case of Brown *v.* Eastern Railway Co., decided by the S. J. C. of Mass., in 1851, 6 Law Rep. N. S. 39. That was an action of *assumpsit* for lost baggage. There was a notice printed on the back of the passage-ticket given to the plaintiff, that the defendants would not be responsible beyond a

Any fraud towards the carrier, as a fraudulent disregard of a notice, or an effort to cast on him a responsibility he is not obliged to assume, or to make his liability seem to be greater than it really is, — will extinguish the liability of the carrier so far as it is affected by such fraud.[1]

If a carrier gives a notice which he is authorized to give, the party receiving it is bound by it, and the carrier is under no obligation to make a special inquiry or investigation to see that the notice is complied with, but may assume this as done.[2]

It should, however, be remarked that such notice affects the liability of the common carrier only so far as it is peculiar to him; that is, his liability for a loss which occurs without his agency or fault; for he is just as liable as he would be without notice, for a loss or injury caused by his own negligence or default.[3]

Whether a common carrier could make a valid bargain by which he should be free from all liability, however the loss might

specified sum; but no other notice given, nor was plaintiff's attention called to this. *Held*, that these facts did not furnish that certain notice which must be given to exonerate such carrier from his liability. And see Bean *v.* Green, 3 Fairf. 422; Cobden *v.* Bolton, 2 Camp. 108; Bulter *v.* Heane, id. 415. And if the notice is ambiguous, it will be construed against the carrier. Camden and Amboy Railroad Co. *v.* Baldauf, 16 Penn. St. 67; Beckman *v.* Shouse, 5 Rawle, 179. So, where two valid notices are given, the carrier will be bound by the one least beneficial to himself. Munn *v.* Baker, 2 Stark. 255; Cobden *v.* Bolton, 2 Camp. 108.

[1] See Kenrig *v.* Eggleston, Aleyn, 93; Gibbon *v.* Paynton, 4 Burr. 2298; Tyly *v.* Morrice, Carth. 485; Titchburne *v.* White, 1 Str. 145; Anonymous, cited in Morse *v.* Slue, 1 Vent. 238; Batson *v.* Donovan, 4 B. & Ald. 22.

[2] Batson *v.* Donovan, *supra*; Harris *v.* Packwood, 3 Taunt. 264; Marsh *v.* Horne, 5 B. & Cr. 322; Duff *v.* Budd, 3 Brod. & Bing. 177; Bodenham *v.* Bennett, 4 Price, 31; Sleat *v.* Fagg, 5 B. & Ald. 342. But *contrà*, per *Bronson*, J., in Hollister *v.* Nowlen, 19 Wend. 234.

[3] Although there is a considerable degree of uncertainty in the English cases upon this question, we believe the decided weight of authority is in accordance with the rule stated in the text. Thus, in Wyld *v.* Pickford, 8 M. & W. 443, it was held that the carrier, notwithstanding his notice, was bound to use ordinary care. And *Parke*, B., after reviewing the cases, said: "The weight of authority seems to be in favor of the doctrine, that, in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence, — gross negligence, in the sense in which it has been understood in the last-mentioned cases; and that the effect of a notice, in the form stated in the plea, is, that the carrier will not, unless he is paid a premium, be responsible for all events (other than the act of God and the queen's enemies) by which loss or damage to the owner may arise, against which events he is, by common law, a sort of insurer; but still, he undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to, and delivery at, their place of destination, and in providing proper vehicles for their carriage; and after such a notice, it may be that the burden of proof of damage or loss by the want of such care, would lie on the plaintiff." And see Bodenham *v.* Bennett, 4 Price, 34; Beck *v.* Evans, 16 East, 244; Garnett *v.* Willan, 5 B. & Ald. 57; Batson *v.* Donovan, 4 B. & Ald. 30; Duff *v.* Budd, 3 Brod. & B. 182; 1 Parsons on Cont. 713, n.

occur, may not be certain. But in the present state of the law, we are inclined to think he might; so far, that such a bargain would protect him against every thing but his own wilful or fraudulent misconduct.[1] Beyond this no bargain could lawfully extend.

SECTION VIII.

OF THE CARRIER'S LIABILITY FOR GOODS CARRIED BY PASSENGERS.

A carrier of goods knows precisely what goods, or rather what parcels and packages he receives and is responsible for. A carrier of passengers is responsible for the goods they carry with them as baggage; but only to the extent of what might be fairly and naturally carried as such.[2] This must always be a question of fact, to be settled as such by the jury upon all the evidence, and under the direction of the court. But there can be no precise and definite standard. A traveller on a long journey needs more money and more baggage than on a short one; one to some places, and for some purposes, more than to other places or for other purposes.[3] The rule is well settled, and a reasonable

[1] A series of English cases since the passage of the Carrier's Act, seem to have settled this point in England. See Chippendale *v.* L. and Y. Railway Co. 7 Eng. Law and Eq. 395; Austin *v.* The M. S. and L. Railway, 11 Eng. Law and Eq. 506; Carr *v.* The L. and Y. Railway, 14 Eng. Law and Eq. 344. For cases in this country, see Sager *v.* The Portsmouth, &c. R. R. Co. 31 Maine, 228; Reno *v.* Hogan, 12 B. Monr. 63. And see 1 Parsons on Con. 713, n.

[2] In Hawkins *v.* Hoffman, 6 Hill, 586, it was said, per *Bronson*, J., that the term *baggage*, in such cases, does not embrace money in a trunk, or articles usually carried about the person, and not as baggage. And in Orange County Bank *v.* Brown, 9 Wend, 85, it was held that, where the baggage of a passenger consists of an ordinary travelling trunk, in which there is a large sum of money, such money is not considered as included under the term *baggage*, so as to render the carrier responsible for it. But a passenger may carry, as baggage, money, not exceeding an amount ordinarily carried for travelling expenses. Thus, it was held, in Jordan *v.* The Fall River Railroad Company, 5 Cush. 69, that common carriers are responsible for money *bonâ fide* included in the baggage of a passenger, for travelling expenses and personal use, to an amount not exceeding what a prudent person would deem proper and necessary for the purpose. And see Johnson *v.* Stone, 11 Humph. 419; Bomar *v.* Maxwell, 9 Humph. 621; Weed *v.* S. and S. Railroad Co. 19 Wend. 534.

[3] In McGill *v.* Rowand, 3 Barr. 451, carriers were held responsible for ladies' trunks containing apparel and jewels. And in Woods *v.* Devin, 13 Ill. 746, a common carrier of passengers was held liable for the loss of a pocket-pistol, and a pair of duelling pistols, contained in the carpet-bag of a passenger, which was stolen out of the possession of the carrier. But see Bomar *v.* Maxwell, 9 Humph. 621, where it was held that "a silver watch, worth about thirty-five dollars; also medicines, handcuffs, locks, &c., worth about twenty dollars," were not included in the term baggage, and that the carrier was not responsible for their loss. In Jones *v.* Voorhees, 10 Ohio, 145, it was held that a gold watch, of the value of ninety-five dollars, was a part of the traveller's baggage, and his trunk a proper place to carry it in. And see Hawkins *v.* Hoffman, 6 Hill, 586, per *Bronson*, J.; Brooke *v.* Pickwick, 4 Bing. 218.

construction and application of it must always be made; and for this purpose, the passenger himself, and all the circumstances of the case, must be considered. The purpose of the rule is, to prevent the carrier from becoming liable by the fraud of the passenger, or by conduct which would have the effect of fraud; for this would be the case if a passenger should carry merchandise by way of baggage, and thus make the carrier of passengers a carrier of goods without knowing it, and without having been paid for it.[1] For, generally, a common carrier of passengers, by stage, packet, steamer, or cars, carries the moderate and reasonable baggage of a passenger, without being paid specifically for it. But the law considers a payment for this so far included in the payment of the fare, as to form a sufficient ground for the carrier's liability.[2]

The carrier is only liable for the goods or baggage delivered to him and placed under his care.[3] Hence, if a sender of goods send with them his own servant, and intrust them to him and not to the carrier, the carrier is not responsible.[4] So, if a passenger keeps his baggage, or any part of it, on his person, or in his own hands, or within his own sight and immediate control, instead of delivering it to the carrier or his servants, the carrier is not liable, *as carrier*, for any loss or injury which may happen to them; that is, not without actual default in relation to these specific things.[5] But if the baggage of a passenger is delivered

[1] In Pardee *v.* Drew, 25 Wend. 459, it was held that the owners of steamboats were liable as common carriers for the baggage of passengers; but to subject them to damages for loss thereof, it must be strictly baggage; that is, such articles of necessity and personal convenience as are usually carried by travellers. It was accordingly held in that case, that the carrier was not liable for the loss of a trunk, containing valuable merchandise and nothing else, although it did not appear that the plaintiff had any other trunk with him. And see, to the same effect, Hawkins *v.* Hoffman, 6 Hill, 586. But in Porter *v.* Hildebrand, 14 Penn. St. 129, where the plaintiff was a carpenter moving to the State of Ohio, and his trunk contained carpenter's tools, to the value of $55, which the jury found to be the reasonable tools of a carpenter, it was held that he was entitled to recover. And see Mad River and Lake Erie Railroad Co. *v.* Fulton, 20 Ohio, 318; Great Northern Railway Co. *v.* Shepherd, 9 E. L. & E. 477; Dwight *v.* Brewster, 1 Pick. 50; Bomar *v.* Maxwell, 9 Humph. 621; Beckman *v.* Shouse, 5 Rawle, 179.

[2] See Orange County Bank *v.* Brown, 9 Wend. 85; Powell *v.* Myers, 26 Wend. 591; Richards *v.* The London, &c., Railway Co. 7 C. B. 839; McGill *v.* Rowand, 3 Barr, 451; Camden and Amboy R. R. Co. *v.* Burke, 13 Wend. 611.

[3] See Selway *v.* Holloway, 1 Ld. Raym. 46; Buckman *v.* Levi, 3 Camp. 414; Packard *v.* Getman, 6 Cow. 757; Maving *v.* Todd, 1 Stark. 72.

[4] See Brind *v.* Dale, 8 C. & P. 207; Lovett *v.* Hobbs, 2 Show. 127; Leigh *v.* Smith, 1 C. & P. 640; Orange County Bank *v.* Brown, 9 Wend. 85.

[5] Thus, in an action brought to charge a railroad company, as common carriers, for the loss of an overcoat, belonging to a passenger, it appeared that the coat was not delivered to the defendants, but that the passenger, having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and it was afterwards

to a common carrier, he is liable for it in the same way, and to the same extent, as he is for goods which he carries.

There has grown up in this country a very peculiar exception to the rules of evidence, in relation to travellers' baggage. This exception permits the traveller to maintain his action against the carrier by proving, by his own testimony, the contents of a lost trunk or box, and their value.[1] It is said to rest altogether upon necessity. And, therefore, the testimony of the wife of the owner is similarly admissible.[2] But it is always limited to such things — in quantity, quality, kind, and value — as might reasonably be supposed to be carried in such a trunk or valise.[3] The rule, with this limitation, seems reasonable and safe, and is quite generally adopted.[4] In Massachusetts it was distinctly denied by the Supreme Court, and afterwards established by statute.

The common carrier of goods or of passengers is liable to third parties for any injury done to them by the negligence or default of the carrier, or of his servants.[5] So he is for injury to property

stolen. Held, that the defendants were not liable. Tower *v.* Utica and Schen. R. R. Co. 7 Hill, 47. And see Boys *v.* Prink, 8 C. & P. 361; Syms *v.* Chaplin, 5 Adol. & Ell. 634; Cole *v.* Goodwin, 19 Wend. 251; Robinson *v.* Dunmore, 2 B. & P. 416.

[1] Sparr *v.* Wellman, 11 Missouri, 230; Mad River, &c. R. R. Co. *v.* Fulton, 20 Ohio, 318; Whitesell *v.* Crane, 8 W. & S. 369; Sneider *v.* Geiss, 1 Yeates, 34; Clark *v.* Spence, 10 Watts, 335; Oppenheimer *v.* Edney, 9 Humph. 385; Johnson *v.* Stone, 11 Humph. 419.

[2] Mad River, &c. R. R. Co. *v.* Fulton, 20 Ohio, 318; McGill *v.* Rowand, 3 Barr, 451.

[3] In Pudor *v.* Boston and Maine Railroad, 26 Maine, 458, where the plaintiff proved that he had delivered to the defendants a box to be carried to a certain place; that the box was not delivered; that he had made a demand thereof; and that the defendants admitted its loss; and then "offered to show, by his own testimony, (it not appearing that he had any other means of showing it,) what was in said box, and the value of the articles," the declaration having alleged that the box contained medical books, surgical instruments, and chemical apparatus, it was *held* that the plaintiff's oath was inadmissible. And see Bingham *v.* Rogers, 6 W. & S. 495; Mad River R. R. Co. *v.* Fulton, 20 Ohio, 318.

[4] It was entirely repudiated by the Supreme Court of Massachusetts, in Snow *v.* Eastern Railroad Co. 12 Met. 44. The statute by which the legislature interfered, and made the law upon this point to conform substantially with what we have stated, was passed 1851, chapter 147. The 5th section contains this provision.

[5] Thus, in Boss *v.* Litton, 5 C. & P. 407, which was an action of trespass for injuring the plaintiff by driving a cart against him, it appeared that the plaintiff was walking in the carriage-way in the neighborhood of Islington, about ten o'clock in the evening, when the defendant, who was driving a taxed cart, turned out from behind a post-chaise, and drove against the plaintiff, and knocked him down. It was held that the plaintiff was entitled to recover. It was proved that the footpath was in a bad state, and seldom used; but Lord *Denman* observed that "a man has a right to walk in the road if he pleases. It is a way for foot passengers as well as carriages." And see Stables *v.* Eley, 1 C. & P. 614; Sleath *v.* Wilson, 9 C. & P. 607; Joel *v.* Morrison, 6 C. & P. 501; Clay *v.* Wood, 5 Esp. 44; Rathbun *v.* Payne, 19 Wend. 399; Wynn *v.* Allard, 5 W. & S. 524; Cook *v.* Champlain Transp. Co. 1 Denio, 91; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255; Cotterill *v.* Starkey, 8 C. & P. 691; Hawkins *v.* Cooper, id. 473; Wynn *v.* Allard, 5 W. & S. 524. And in Illidge *v.* Goodwin, 5 C. &

by the wayside, caused by his fault.[1] But the negligence of the party suffering the injury, if it was material and contributed to the injury, is a good defence for the carrier; unless malice on his part can be shown.[2]

Whether a railroad company is responsible for fire set to buildings or property along the road, without negligence on its part, has been much considered both in England and in this country. In some of our States they are made so liable by statute provision. And this fact, together with the general principles of liability for injury done, would seem to lead to the conclusion that they are not liable unless in fault, or unless made so by statute.[3]

P. 190, it was held that, if a horse and cart are left in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by, in striking the horse. And see Lynch *v.* Nurdin, 1 Q. B. 29.

[1] Cook *v.* The Champlain Transportation Co. 1 Denio, 91; Davies *v.* Mann, 10 M. & W. 546.

[2] In Butterfield *v.* Forrester, 11 East, 60, Lord *Ellenborough* said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." And see Cotterill *v.* Starkey, 8 C. & P. 691; Woolf *v.* Beard, id. 373. And this doctrine, as laid down in the text, has been frequently recognized by the court, in this country. See Willetts *v.* Buffalo and Rochester R. R. Co. 14 Barb. 585; White *v.* Winnisimmet Co. 7 Cush. 160; Trow *v.* Vt. Cent. R. R. Co. 24 Vt. 487; Brown *v.* Maxwell, 6 Hill, 592; Tonawanda R. R. Co. *v.* Munger. 5 Denio, 255, 4 Comst. 349; Parker *v.* Adams, 12 Metc. 415; May *v.* Princeton, 11 Met. 442; Cook *v.* Champlain Transportation Co. 1 Denio, 91; Barnes *v.* Cole, 21 Wend. 188; Rathbun *v.* Payne, 19 Wend. 399; Perkins *v.* Eastern and B. and M. R. R. Co. 29 Maine, 307. And see Willoughby *v.* Horridge, 16 E. L. & E. 437. In Brownell *v.* Flagler, 5 Hill, 282, it was held that, though the plaintiff was guilty of negligence, still he might recover in an action on the case, if the evidence showed intentional wrong on the part of the defendant. So, where the person injured is incapable of exercising ordinary care and caution. Therefore, where the defendant's servant left a horse and cart unattended in a public street, and the plaintiff, a child under seven years of age, during the driver's absence, climbed on the wheel, and other children urged forward the horse, whereby the plaintiff was thrown to the ground and hurt, it was *held* that the jury were justified in finding a verdict for the plaintiff, although the plaintiff was a trespasser, and contributed to the injury by his own act. Lynch *v.* Nurdin, 1 Q. B. 29. And see Birge *v.* Gardiner, 19 Conn. 507; Robinson *v.* Cone, 22 Vt. 213. But see, *contrà*, Hartfield *v.* Roper, 21 Wend. 615; Brown *v.* Maxwell, 6 Hill, 592; Munger *v.* Tonawanda R. R. Co. 4 Comst. 349.

[3] See Aldridge *v.* Great Western Railway Co. 2 Railway and Canal Cases, 852; Cook *v.* Champlain Transportation Co. 1 Denio, 91. In Baltimore and Susquehanna R. R. Co. *v.* Woodruff, 4 Maryland, 242, it was held that the degree of negligence requisite to render a railroad company liable in damages for fire occasioned by its locomotive, is that which results from a want of reasonable care and diligence, and not that arising from the absence of the slightest or least care and attention. And see Railroad Co. *v.* Yeiser, 8 Barr, 366. In Hart *v.* The Western R. R. Co. 13 Met. 99, a shop, adjoining a railroad track, was destroyed by fire communicated by a locomotive engine of the defendants; and while the shop was burning, the wind wafted sparks from it across a street, sixty feet, upon a house, and set it on fire, whereby it was injured. *Held*, that the owner of the house was entitled to recover of the defendants the damages caused by the fire. Under statute 1840, c. 85, § 1, which provides that, when any injury is done to a building of any person "by fire communicated" by a locomotive engine of a railroad corporation, the said corporation shall be responsible, in damages,

A frequent cause of disaster, both on land and on the ocean, is collision. For this, a carrier by land, a railroad company for example, should be held liable, in our view of this question, unless the company could show that it took all possible care to prevent the collision; and we do not know that the general principles of law in relation to carriers could lead to any other conclusion.[1]

The common carrier at sea, whether under canvas or steam, must be held to a careful, if not a strict compliance with the rules and practice, applicable to each case of meeting another vessel, which have been devised for the purpose of preventing collision; and of which we speak in our chapter on the law of shipping.

to the person so injured. And see further, upon this subject, Lyman *v.* The Boston and Worcester Railroad Co. 4 Cush. 288; McCready *v.* The South Carolina R. R. Co. 2 Strobh. 356.

[1] See Bridge *v.* Grand Junction Railway Co. 3 M. & W. 244; Chaplin *v.* Hawes, 3 C. & P. 554; Mayhew *v.* Boyce, 1 Stark. 423; Monroe *v.* Linch, 7 Met. 274; Churchill *v.* Rosebeck, 15 Conn. 359; Little Miami Railroad Co. *v.* Stevens, 20 Ohio, 415; Pluckwell *v.* Wilson, 5 C. & P. 375; Kennard *v.* Burton, 25 Maine, 39; M'Lane *v.* Sharpe, 2 Harring. 481; Wordsworth *v.* Willan, 5 Esp. 273; Turley *v.* Thomas, 8 C. & P. 103; Wayde *v.* Carr, 2 D. & R. 255; Clay *v.* Wood, 5 Esp. 44.

CHAPTER XIII.

OF LIMITATIONS.

SECTION I.

OF THE STATUTE OF LIMITATIONS.

In 1623, the statute of 21 James I. c. 16, commonly called the Statute of Limitations, was passed in England. Among its provisions, it enacts that all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending, or contract without specialty, and all actions for arrearages of rent, shall be commenced and sued within six years next after the cause of such actions or suit, and not after.

The provisions of this statute were copied, without much important variation, in the statutes of all our States; and upon them, as they are explained, and in some respects materially modified by adjudication, the law of limitation rested, in England and in this country, until 1827, when the statute of 9 Geo. IV. c. 14, commonly called Lord *Tenterden's* Act, was passed. This statute, after reciting the statute of James, provides: "That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new continuing contract, whereby to take a case out of the operation of the said enactment, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint con-

tractor, executor, or administrator, shall lose the benefit of said enactment, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest, made by any person whatsoever; provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by the said recited act or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."[1]

SECTION II.

CONSTRUCTION OF THE STATUTE.

For the law of limitation there is a twofold foundation. In the first place, the actual probability that a debt which has not been claimed for a long time, was paid, and that this is the reason of the silence of the creditor.[2] But besides this reason, there is the inexpediency and injustice of permitting a stale and neglected claim or debt, even if it has not been paid, to be set up and enforced after a long silence and acquiescence.[3] In truth, these two reasons mingle; but as one or the other prevails, its effect is seen in the construction of this law, and in its application to cases.

[1] Statutes substantially similar have been passed in Maine, Massachusetts, Vermont, New York, Indiana, Michigan, Arkansas, and California.

[2] "The Statute of Limitations is a bar, on the supposition, after a certain time, that a debt has been paid, and vouchers lost; and wherever it appears, by the acknowledgment of the party, that it is not paid, that takes the case out of the statute." Per *Bayley*, J., in Clark *v.* Hougham, 2 B. & Cr. 154.

[3] Thus, in Dickson *v.* Thomson, 2 Show. 125, where the claim was more than six years old, it was held that the confession or acknowledgment of the debt within six years was not sufficient to renew the claim. See also, Lacon *v.* Briggs, 3 Atk. 105; Bass *v.* Smith, 12 Vin. Abr. 229, pl. 4.

If, for example, the statute is considered as only a statute of presumption, or, in other words, if it is supposed to say that a debt which is six years old, shall not be demanded, because the law presumes that so old a debt must have been paid, it is obvious that courts will look to the evidence offered to meet the law, mainly for the purpose of requiring that it shall rebut this presumption, by proving that the debt still exists.[1] And in this view, and for this purpose, any acknowledgment or admission of the mere existence of the debt, by the debtor, would be sufficient to do away with the law.[2] If, however, courts regarded the statute rather as a statute of repose, or, in other words, as intended to prevent the enforcement of stale claims, whether they were paid or not, then it is obvious that a mere admission that the debt was legal and remains unpaid, amounts to nothing. The law says it has remained unpaid so long, that it is too late now to bring it forward.[3] But if the debtor is willing to waive the protection of the law, and not only acknowledges the debt, but promises to pay it, there is no reason why he should not be held upon this promise.

Between these two views, it may be said that the courts have fluctuated from the beginning. As soon as the statute was passed, whenever it was pleaded by the defendant in bar of the action, if the plaintiff sought to remove this bar by any words of

[1] In Bryan *v.* Horseman, 5 Esp. 81, evidence was offered that the defendant said that he had no recollection of the debt, but relied on the statute; and this was not considered sufficient to rebut the presumption that a debt of above six years' standing was paid. See also, Beale *v.* Nind, 4 B. & Ald. 568; Lloyd *v.* Maund, 2 T. R. 760; Clark *v.* Hougham, 2 B. & Cr. 149; Frost *v.* Bengough, 1 Bing. 266; East India Co. *v.* Prince, Ry. & M. 407.

[2] In Truman *v.* Fenton, Cowper, 548, Lord *Mansfield* said: "The slightest acknowledgment has been held sufficient to rebut the presumption that an old debt has been paid; as saying, 'Prove your debt and I will pay you;' 'I am ready to account, but nothing is due to you;' and much slighter acknowledgments than these will take a case out of the statute." And see Yea *v.* Fouraker, 2 Burr. 1099; Richardson *v.* Fen, Lofft, 86; Catling *v.* Skoulding, 6 T. R. 189; Lawrence *v.* Warrall, Peake, N. P. 93; Clarke *v.* Bradshaw, 3 Esp. 155; Rucker *v.* Hannay, 4 East, 604, n. (a); Gainsford *v.* Grammar, 2 Camp. 9; Leaper *v.* Tatton, 16 East, 420; Loweth *v.* Fothergill, 4 Camp. 184; Dowthwaite *v.* Tibbut, 5 M. & Sel. 75; Triggs *v.* Newnham, 1 C. & P. 631; Sluby *v.* Champlin, 4 Johns. 461; De Forest *v.* Hunt, 8 Conn. 179; Glenn *v.* McCullough, Harper, 484; Burden *v.* M'Elhenny, 2 Nott & McCord, 60; Sheftall *v.* Clay, R. M. Charlt. 7; Aiken *v.* Benton, 2 Brevard, 330.

[3] In Tanner *v.* Smart, 6 B. & Cr. 603, Lord *Tenterden*, after reviewing the authorities on this point, says: "All these cases proceed upon the principle that, under the ordinary issue on the Statute of Limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect."

the defendant, he was obliged to allege in his replication "a new promise" by the defendant. This rule of pleading remains good to the present day, wherever the old system of pleading is in force. And it tends to show that, at the beginning, the statute was regarded as a statute of repose, which could not be set aside by a mere acknowledgment that the debt was unpaid. But, although the rule itself indicates this, the practice of the courts took the opposite direction. An impression prevailed, not, perhaps, at the beginning,[1] but early, and continued long, that the statute itself was not to be favored,[2] that a resort to it was generally a dishonorable attempt to escape the payment of a just debt; and that the court should give its aid to the creditor who endeavored to do away the effect of this law. Such language as this was not used, but such was the practice; and, accordingly, any sort of acknowledgment, proved in almost any way, was permitted to remove the bar of the statute.[3]

At length, however, a different, and, as we think, a far more just and rational view prevailed. It began to be admitted by the profession and by the courts, although it never has been, perhaps, by the community, that it was a necessary and beneficial law, to be, if not favored, at least applied fairly and rationally, and permitted to do its very useful work in suppressing stale claims.[4]

[1] In Green *v.* Rivett, 2 Salk. 422, the Court of King's Bench said: "The Statute of Limitations, on which the security of all men depends, is to be favored."

[2] Willett *v.* Atterton, 1 Wm. Bl. 35; Perkins *v.* Burbank, 2 Mass. 81.

[3] Thus, in Leaper *v.* Tatton, 16 East, 420, in *assumpsit* against the defendant, as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, was held sufficient to renew the claim. And see Richardson *v.* Fen, Lofft, 86; Lloyd *v.* Maund, 2 T. R. 760; Bryan *v.* Horseman, 4 East, 599; Clark *v.* Hougham, 2 B. & Cr. 154; Mountstephen *v.* Brooke, 3 B. & Ald. 141. See also *ante*, p. 232, n. 2.

[4] In Spring *v.* Gray, 5 Mason, 523, *Story*, J., said: "I consider the Statute of Limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest object. It is a statute of repose; the object of which is, to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all the proper evidence and vouchers are lost, or the facts have become obscure, from the lapse of time, or the defective memory, or death, or removal of witnesses. The defence, therefore, which it puts forth, is an honorable defence, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practicable manner, such as are ancient and unacknowledged; and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers and evidence to repel them. The natural presumption certainly is, that claims which have been long neglected, are unfounded, or at least are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their

These views are now very general, both in the English courts and in our own. One effect of them was Tenterden's Act, which we have given already, and which, as may be seen, guards against the admission of loose and uncertain testimony in proof of a new promise.

Before inquiring into the rules of law which now apply to the case of an acknowledgment or new promise, it should be remarked that a prescription, or limitation, much more ancient than the statutes above quoted, is still in full force. This is the presumption of payment after twenty years, which is applicable to all debts; not only the simple contracts to which these statutes refer, but to specialties, or contracts or debts under seal or by judgment of court.[1] Of these it will not be necessary to speak here, excepting to remark that in one or two of our States, the statute of limitation excepts a promissory note which is signed in the presence of an attesting witness, and is put in suit by the original payee, or his executor or administrator.[2] Bank-bills and

ignorance, or their over-confidence in regard to transactions which have become dim by age. Yet, I well remember the time when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defence; and when, to the reproach of the law, almost every effort of ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admissions of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation." In A'Court *v.* Cross, 3 Bing. 329, defendant, being arrested on a debt more than six years old, said: "I know that I owe the money, but the bill I gave is on a three penny stamp, and I will never pay it;" and it was held that such an acknowledgment of a debt would not revive it against a plea of the statute. So, in Ayton *v.* Bolt, 4 Bing. 105. And in Tanner *v.* Smart, 6 B. & Cr. 603, in *assumpsit*, brought to recover a sum of money, it was proved, in answer to the plea of the Statute of Limitations, that the defendant said within six years, "I cannot pay the debt at present, but I will pay it as soon as I can;" held, that this acknowledgment was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. In Hart *v.* Prendergast, 14 M. & W. 741, defendant, on being requested to pay his debt, wrote the following letter to the plaintiff's clerk: "I will not fail to meet Mr. H. on fair terms, and have now a hope that, before, perhaps, a week from this date, I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance." Held, that this letter was not sufficient to defeat a plea of the Statute of Limitations. And *Parke*, B., said: "There is no doubt of the principle of law applicable to these cases, since the decision in Tanner *v.* Smart; namely, that the plaintiff must either show an unqualified acknowledgment of the debt, or, if he show a promise to pay, coupled with a condition, he must show performance of the condition; so as in either case to fit the promise laid in the declaration, which is a promise to pay on request. The case of Tanner *v.* Smart, put an end to a series of decisions which were a disgrace to the law, and I trust we shall be in no danger of falling into the same course again."

[1] See Christophers *v.* Sparke, 2 Jac. & Walk. 223; Duffield *v.* Creed, 5 Esp. 52; Cooper *v.* Turner, 2 Stark. 497.

[2] This is the case in Massachusetts. Walker *v.* Warfield, 6 Met. 466; Earle *v.* Reed,

other evidences of debt issued by banks, are everywhere excepted from the operation of the statute.[1]

SECTION III.

OF THE NEW PROMISE.

The first question we propose to consider, is, what is the new promise which suffices to take a case out of the statute. If the promise be made, the former debt, although not in itself enforceable, is considered a sufficient consideration for the new promise.[2] This might be made as well orally as in writing, until Lord *Tenterden's* Act. But, although this act requires, as matter of evidence, that the new promise shall be in writing, it does not affect at all any question respecting the character or sufficiency of the new promise; they remain to be decided by the same principles, and in the same manner as before.[3]

The first thing to be said, is, that now, by the general consent of the courts of this country and of England, a mere acknowledgment, which does not contain by any reasonable implication or construction, a new promise, and still more, if it expressly excludes a new promise, is not sufficient.[4] A new promise is

10 id. 387; Drury *v.* Vannevar, 1 Cush. 276; Rockwood *v.* Browne, 1 Gray 261. And in Maine. Boody *v.* Lunt, 19 Maine, 72; Stone *v.* Nichols, 23 Maine, 497.

[1] Dougherty *v.* The Western Bank of Georgia, 13 Geo. 287.

[2] Geer *v.* Archer, 2 Barb. 424.

[3] Thus, in Morrell *v.* Frith, 3 M. & W. 405, the defendant stated, in a letter, that he daily expected to be able to give a satisfactory reply to the plaintiff's demand; and although this was in writing, *Parke*, B., said: "The document, in order to take the case out of the statute, must either contain a promise to pay the debt on request, or acknowledgment from which such promise is to be inferred." And see Haydon *v.* Williams, 7 Bing. 166, 167.

[4] In the leading American case upon this point, Bell *v.* Morrison, 1 Pet. 351, which was *assumpsit* for goods sold and delivered, it was proved, in answer to the plea of the statute of limitations, that the defendant, one of the partners of a firm then dissolved, said to the plaintiff: "I know we are owing you;" "I am getting old, and I wish to have the business settled;" it was held that these expressions were insufficient to revive the debt. So, in Ventris *v.* Shaw, 14 N. H. 422, *assumpsit* on a promissory note, defendant, on being asked to pay the note, said: "He guessed the note was outlawed, but that would make no difference, he was willing to pay his honest debts, always." As he did not state in direct terms that he was willing to pay the note, this was held not sufficient to revive the debt. And see Laforge *v.* Jayne, 9 Penn. St. 410; Mitchell *v.* Sellman, 5 Maryl. 376; Butler *v.* Winters, 2 Swan, (Tenn.) 91; Ross *v.* Ross, 20 Ala. 105; Sherman *v.* Wakeman, 11 Barb. 254; Brainard *v.* Buck, 25 Vt. 573; Williams *v.* Griffith, 3 Exch. 335; Hard *v.* Prendergast, 14 M. & W. 741. In Deloach *v.* Turner, 7 Richardson, 143, it was held that a slight acknowledgment, made before the statutory period is complete, is sufficient to take the case out of the statute. But in Tompkins

not now implied by the law itself, from a mere acknowledgment.[1]

Whether an acknowledgment of an existing debt is sufficient to take it out of the statute, or, in other words, whether it carries with it a promise to pay that debt, is a question of law for the court, when it is only a question as to the legal meaning and effect of the words used, for this would be a mere question of construction; which is always a matter of law only.[2] But if the question is as to what words were used, and what was the intention of the parties to be gathered from the words and acts, this is a question of fact, and it is for the jury to determine.

The acknowledgment need not define the amount of the debt.[3] That can be done by evidence, if only the existence of the debt and the purpose of paying it are acknowledged. Still, the acknowledgment must be of the specific debt, or must distinctly include it;[4] if wholly general and undefined, it is not enough.[5]

v. Brown, 1 Denio, 247, where a conditional promise was made for the payment of a debt before the six years had expired, it was held that the law was the same, whether the promise or acknowledgment was made before or after the statute had barred the demand. And see Dean *v.* Hewitt, 5 Wend. 257; Watkins *v.* Stevens, 4 Barb. 168; Shoemaker *v.* Benedict, 1 Kernan, 176.

[1] As, "I should be happy to pay if I could," Ayton *v.* Bolt, 4 Bing. 105; or, "I have no recollection of the debt, but rely on the statute," Bryan *v.* Horseman, 5 Esp. 81; or such other acknowledgments from which a court or jury might be led to believe, or from which it might be legally implied, that the debt has not been paid; but in which the law can find no promise to pay, either expressed or implied. See Tanner *v.* Smart, 6 B. & Cr. 603, and Bell *v.* Morrison, 1 Pet. 351, in which this doctrine was fully established by Lord Tenterden and Justice Story. And see Sherman *v.* Wakeman, 11 Barb. 254; Routledge *v.* Ramsay, 8 Ad. & El. 221; Smith *v.* Thorn, 10 Eng. Law and Eq. 391; Morgan *v.* Walton, 4 Penn. St. 321; Gilkyson *v.* Larue, 6 Watts & Serg. 213.

[2] In Lloyd *v.* Maund, 2 T. R. 760, the acknowledgment was contained in a letter, and yet, the question whether the acknowledgment was sufficient, was submitted to the jury. The same course was pursued in Frost *v.* Bengough, 1 Bing. 266, and in Bird *v.* Gammon, 3 Bing. N. C. 883. But the authority of these cases was much shaken, if not entirely overthrown, by the case of Morrell *v.* Frith, 3 M. & W. 402, where *Parke*, B., said: "If I am called upon to give an opinion, I think the case of Lloyd *v.* Maund, is not law. The construction of a doubtful instrument itself is not for the jury, although the facts by which it may be explained, are." See Clarke *v.* Dutcher, 9 Cow. 674; Martin *v.* Broach, 6 Geo. 21. See 2 Parsons on Contracts, 4, 5.

[3] Thus, in Dickinson *v.* Hatfield, 1 M. & Rob. 141, the plaintiff produced a letter from the defendant, in which he promised to pay "the balance" due from him to the plaintiff, but did not specify any particular amount. Held, that it was not necessary that the amount of the debt should be specified. And see, to the same effect, Lechmere *v.* Fletcher, 1 Cr. & M. 623; Bird *v.* Gammon, 3 Bing. N. C. 883; Williams *v.* Griffith, 3 Exch. 335; Gardner *v.* M'Mahon, 3 Q. B. 561; Waller *v.* Lacy, 1 M. & G. 54; Hazlebaker *v.* Reeves, 12 Penn. St. 264; Dinsmore *v.* Dinsmore, 21 Maine, 433; Davis *v.* Steiner, 14 Penn. St. 275.

[4] See Barnard *v.* Bartholomew, 22 Pick. 291; Clark *v.* Dutcher, 9 Cow. 674; Stafford *v.* Bryan, 3 Wend. 532; Arey *v.* Stephenson, 11 Ired. 86; Martin *v.* Broach, 6 Geo. 21. But if only one debt is shown to exist, the acknowledgment will be presumed to refer to that. Woodbridge *v.* Allen, 12 Met. 470; Guy *v.* Tams, 6 Gill. 82.

[5] In Robbins *v.* Farley, 2 Strobh. 348, the defendant's intestate said to her attorney,

A testator who provides for the payment of his debts generally, does not thereby make a new promise as to any one of them.[1]

If the new promise is conditional, the party relying upon it must be prepared to show that the condition has been fulfilled.[2] Even if it is wholly unconditional and unqualified in its terms, it is competent for the defendant to show, by the attendant circumstances or other proper evidence, that it was not intended, nor understood as an acknowledgment or a promise.[3] On the other hand, if the expressions in themselves are doubtful, the plaintiff may make them clear by evidence.

As the acknowledgment should be voluntary, we doubt whether those made under process of law, as by a bankrupt, or by answers to interrogatories which could not be avoided, should ever have the effect of a new promise.[4]

A doctrine has prevailed, and, perhaps, has at present the weight of authority in its favor, according to which every new item and credit in a mutual and running account, is an acknowledgment, by the party making it, that the account is open and unsettled, and so draws after it all preceding items as to have the same effect as a recognition of them, and a promise to pay the balance, when that should be struck. This doctrine grew up, we think, in those days when courts disliked the Statute of

"that the plaintiff was to receive compensation for his services" to her, and "that she had never paid him." Held, that such an acknowledgment was too general to remove the bar of the Statute of Limitations. And see Moore *v.* Hyman, 13 Ired. 272; Shaw *v.* Allen, 1 Busbee, (N. Car.) 58; McBride *v.* Gray, id. 420; Harbald *v.* Kuntz, 16 Penn. St. 210.

[1] Bloodgood *v.* Bruen, 4 Sandf. 427; Carrington *v.* Manning, 13 Ala. 611; Braxton *v.* Wood, 4 Gratt. 25; Murray *v.* Mechanics' Bank, 4 Edw. Ch. 567; Evans *v.* Tweedy, 1 Beav. 55; Walker *v.* Campbell, 1 Hawks, 304; Freake *v.* Cranefeldt, 3 My. & Cr. 499.

[2] Tanner *v.* Smart, 6 B. & Cr. 603; Tompkins *v.* Brown, 1 Denio, 247; Ayton *v.* Bolt, 4 Bing. 105; Haydon *v.* Williams, 7 Bing. 163; Humphreys *v.* Jones, 14 M. & W. 1; Laforge *v.* Jayne, 9 Penn. St. 410; Sherman *v.* Wakeman, 11 Barb. 254; Hill *v.* Kendall, 25 Vt. 528; Butterfield *v.* Jacobs, 15 N. H. 140.

[3] Cripps *v.* Davis, 12 M. & W. 159.

[4] In Brown *v.* Bridges, 2 Miles, 424, where the defendant, as an insolvent debtor, had stated a claim against him in a schedule of his debts, it was held that such an acknowledgment is not sufficient to take the case out of the statute. And the court said: "An acknowledgment of a debt, to prevent the operation of the Statute of Limitations, must at least be consistent with a promise to pay. This is the law of Pennsylvania. The acknowledgment in defendant's petition for the benefit of the insolvent laws, is not of this character; for, the very basis on which an insolvent asks his discharge, is, that he is unable to pay his debts. How this can be tortured into a promise to pay, or as being consistent with such a promise, we are at a loss to discover." And see, to the same effect, Christy *v.* Flemington, 10 Penn. St. 129; Kennett *v.* Milbank, 8 Bing. 38; Wellman *v.* Southard, 30 Maine, 425; Pott *v.* Clegg, 16 M. & W. 321. But see the opposite doctrine, in Eicke *v.* Nokes, 1 M. & Rob. 359.

Limitations, and sought opportunities, or at least favored attempts, to defeat it. Such is not the view of courts at present; and we should say that the general principles now prevalent, would eventually limit this doctrine to cases where the account was mutual and open, and there was evidence that the items relied upon were intended to be charged in offset, so as to have the effect of a part-payment.[1]

SECTION IV.

OF PART-PAYMENT.

A part-payment of a debt is such a recognition of it as implies a new promise;[2] even if it be made in goods or chattels, if agreed to be received as payment,[3] or by negotiable promissory note or bill.[4] But it has this effect only when the payment is

[1] In a leading case upon this point, Catling *v.* Skoulding, 6 T. R. 189, it was held, that if there be a mutual account of any sort between the plaintiff and defendant, for an item of which credit has been given within six years, it is evidence that there is an open account between the parties, and a promise to pay the balance, which would remove the bar of the statute. See the decision of Lord Kenyon in this case, which is, perhaps, consistent with the views then prevailing in respect to new promises and acknowledgments; but it is submitted that it cannot be sustained upon principle since the decision in Tanner *v.* Smart, in England, and Bell *v.* Morrison, in this country. And a more distinct line is drawn in Blair *v.* Drew, 6 N. H. 235, where it is shown that new items, in mutual accounts, within six years next before action brought, do not, of themselves, constitute an admission of an unsettled account, extending beyond six years, nor furnish any evidence of a promise to pay a balance, so as to take the case out of the Statute of Limitations. The same view is adopted in Kentucky. Lansdale *v.* Brashear, 3 Monr. 330; Smith *v.* Dawson, 10 B. Monr. 112; and in Tennessee, Craighead *v.* The Bank, 7 Yerg. 399. It must, however, be admitted that the main current of American decisions is still in accordance with Catlin *v.* Skoulding. See Abbott *v.* Keith, 11 Vt. 529; Hodge *v.* Manley, 25 id. 210; Cogswell *v.* Dolliver, 2 Mass. 217; Kimball *v.* Brown, 7 Wend. 322; Chamberlin *v.* Cuyler, 9 id. 126; Sickles *v.* Mather, 20 id. 72; Todd *v.* Todd, 15 Ala. 743; Wilson *v.* Calvert, 18 id. 274. This question was set at rest in England, by Lord *Tenterden's* Act, very soon after Tanner *v.* Smart was decided. See Williams *v.* Griffiths, 2 Cr. M. & Ros. 45; Mills *v.* Fowkes, 7 Scott, 444; Cottam *v.* Partridge, 4 Scott, N. R. 819. The cases cited above must not be confounded with the cases concerning "merchants' accounts," which will be considered hereafter.

[2] In Whipple *v.* Stevens, 2 Foster, 219, the court said: "It is well settled that a partial payment of a debt amounts to an acknowledgment of a present subsisting debt, which the party is liable and willing to pay; from which, in the absence of any act or declaration, on the part of the party making the payment, inconsistent with the idea of a liability and willingness to pay, a jury may and ought to infer a new promise."

[3] In Hooper *v.* Stephens, 4 Ad. & El. 71, where defendant owed plaintiff for hay, and gave him, as part-payment of it, a gallon of gin, which plaintiff received as such; held, that such part-payment was sufficient to take the original debt out of the statute. And see Cottam *v.* Partridge, 4 Scott, N. R. 819; Hart *v.* Nash, 2 Cr. M. & Ros. 337.

[4] It was so held in Ilsley *v.* Jewett, 2 Met. 168; but the decision was put upon the ground that, in Massachusetts, the giving of such note or bill is *primâ facie* evidence of payment and discharge of the debt for which it was given. A similar decision, how-

made as of a part of a debt.[1] If it is made in settlement of the whole, of course it is no promise of more. And a bare payment, without words or acts to indicate its character, would not be construed as carrying with it an acknowledgment that more was due and would be paid.[2]

If a debtor owes several debts, and pays a sum of money, he has the right of appropriating that money as he pleases. If he pays it without indicating his own appropriation, the general rule is, that the creditor who receives the money, may appropriate it as he will.[3] There is, however, this exception. If there be two or more debts, some of which are barred by the statute, and others are not barred by it, the creditor cannot appropriate the payment to a debt that is barred, for the purpose of taking it out of the statute by such part-payment.[4] If a debt consists of both principal and interest, a payment specifically on account of either of these, will take the remainder of that and the whole of the other out of the statute.[5] If mutual accounts are settled, and a balance struck, all the items which are within the admitted ac-

ever, has been made in the recent case of Turney *v.* Dodwell, 24 Eng. Law and Eq. 92, in England, where no such rule prevails. That was an action on a promissory note, by the payee against the maker. The defendant gave the plaintiff, on the 5th of May, 1843, a note for £108 15*s*. In February, 1848, the defendant accepted a bill of exchange drawn on him by the plaintiff, for £30, in part-payment of the note; and this was held sufficient to take the case out of the statute. Lord *Campbell* said: "In mercantile transactions, nothing is more usual than to stipulate for a payment by bills, where there is no intention of their being taken in absolute satisfaction. We are satisfied that a transaction of this nature is properly described by the word "payment," and that it is clearly within the class of acknowledgments intended to be unaffected by the statute; and we are satisfied that there is no reason whatever to restrict the expression in the statute to that species of payment which imports a final satisfaction."

[1] Tippets *v.* Heane, 1 Cr. M. & Ros. 252. This was an action of *assumpsit* for meat, lodging, &c., furnished by plaintiff for defendant's son. At the trial, before *Vaughan*, B., the plaintiff, to take the case out of the statute, proved, by one A B, that he had paid £10 to the plaintiff, by direction of defendant, in the year 1829, but could not speak to the account on which it was paid, or give any evidence beyond the mere fact of having paid the money by the defendant's direction. Held, that this was not sufficient evidence of part-payment to go to the jury. And see Arnold *v.* Downing, 11 Barb. 554; Hodge *v.* Manley, 25 Vt. 210; Alston *v.* State Bank, 4 Eng. (Ark.) 455; State Bank *v.* Wooddy, 5 id. 638; Wood *v.* Wylds, 6 id. 754; Linsell *v.* Bonsor, 2 Bing. N. C. 241; Waters *v.* Tompkins, 2 Cr. M. & Ros. 726; Waugh *v.* Cope, 6 M. & W. 824; Wainman *v.* Kynman, 1 Exch. 118; Davies *v.* Edwards, 7 Exch. 22.

[2] McCullough *v.* Henderson, 24 Mississippi, 92; Smith *v.* Westmoreland, 12 Sm. & Marsh. 663. And see cases cited in preceding note.

[3] In Ayer *v.* Hawkins, 19 Vt. 26, it was held that a creditor having several notes against his debtor, all of which are barred by the Statute of Limitations, may appropriate a general payment of such debtor to any one of the notes, even the largest, and revive that particular note, but he cannot distribute such general payment upon all his claims, and thus avoid the statute as to all.

[4] Mills *v.* Fowkes, 5 Bing. N. C. 455.

[5] Bradfield *v.* Tupper, 7 Eng. Law and Eq. 541; Sanford *v.* Hayes, 19 Conn. 591; Parsonage Fund *v.* Osgood, 21 Maine, 176; Bealy *v.* Greenslade, 2 Cr. & Jer. 61.

count, are so many payments, and may have the effect of part-payments in taking a debt towards which they go, out of the statute.[1] So, a payment for a creditor to a third party, is the same thing as a payment to the creditor.[2]

The Tenterden Act requires that the new promise should be in writing; but provides also, that nothing in it shall alter, or take away, or lessen the effect of any payment of any principal or interest. This, therefore, remains a new promise as before. But does the rest of the statute apply to it, and is it necessary that the evidence of the part-payment should be in writing? The American doctrine is, that there is no such requirement, and the whole matter of part-payment, both as to evidence and as to effect, remains as before.[3]

SECTION V.

OF THE PROMISE OF ONE OF SEVERAL JOINT DEBTORS.

The question has frequently arisen, whether a new promise by one of two or more joint debtors, has the effect of reviving the debt as to the others, who make no promise. If the statute be one of presumption, such an admission would prove the debt and remove the statute as to all. So it has been held.[4] But the

[1] Thus, in Ashby *v.* James, 11 M. & W. 542, it was held that, where A has an account against B, some of the items of which are more than six years old, and B has a cross account against A, and they meet and go through both accounts, and a balance is struck in A's favor, this amounts to an agreement to set off B's claim against the earlier items of A's, out of which arises a new consideration for the payment of the balance, and takes a case out of the operation of the Statute of Limitations, notwithstanding the provisions of Lord *Tenterden's* Act. *Alderson*, B., said: "The truth is, that the going through an account, with items on both sides, and striking a balance, converts the set-off into payments; the going through an account, where there are items on one side only, as was the case in Smith *v.* Forty, 4 C. & P. 126, does not alter the situation of the parties at all, or constitute any new consideration. Here, the striking of a balance between the parties is evidence of an agreement that the items of the defendant's account shall be set off, against the earlier items of the plaintiff, leaving the case unaffected, either by the Statute of Limitation, or the set-off.

[2] Worthington *v.* Grimsditch, 7 Q. B. 479.

[3] Thus, in Williams *v.* Gridley, 9 Met. 482, where the payee sued the maker of a promissory note, it was held that the plaintiff, in answer to the plea of the Statute of Limitations, might introduce parol evidence to show a part-payment of the note by the defendant within six years. And see Sibley *v.* Lumbert, 30 Maine, 253. It is so held now in England also. Cleave *v.* Jones, 6 Exch. 573, overruling Willis *v.* Newham, 3 Y. & Jer. 518.

[4] In Whitcomb *v.* Whiting, 2 Doug. 652, where the defendant and three other persons had executed a joint and several promissory note, and one of the other three had paid the interest and part of the principal within six years, it was held that this was

present weight of authority and of reason, limits the effect of the new promise to him who makes it.[1] He may, however, be authorized to promise for the rest, and then he binds them. Thus, if A, B, and C are in partnership, and a note of theirs is more than six years old, the new promise of either of them, given while the partnership continues, binds all three, because either could give a new note binding the firm. But if the partnership has ceased, the new promise of A binds only himself, because he has no longer authority to bind the others.[2] *Tenterden's* Act provides that no joint contractor shall be chargeable by reason of any promise by a co-contractor. Where this clause also is adopted, this question is settled.[3]

sufficient to take the case out of the statute, as to the defendant. Lord *Mansfield* said: "Payment by one is payment for all, the one acting virtually as agent for the rest; and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due." This decision is based partly on the then prevalent view, that any thing said or done, which showed that a debt had not been paid, was sufficient to remove the statutory bar, and partly on the ground of an implied agency.

[1] The doctrine that one joint debtor is virtually the agent of the rest, as laid down by Lord *Mansfield*, in the opinion quoted above, has been, with a few exceptions, and is now regarded as sound law in England. See Perham *v.* Raynal, 2 Bing. 306; Channell *v.* Ditchburn, 5 M. & W. 494, where *Parke*, B., after giving a very elaborate opinion, said: "The result is, that we must consider the case of Whitcomb *v.* Whiting as good law." And see Burleigh *v.* Stott, 8 B. & Cr. 36; Pease *v.* Hirst, 10 id. 122; Wyatt *v.* Hodson, 8 Bing. 309; Manderston *v.* Robertson, 4 M. & Ryl. 440. The principle of Whitcomb *v.* Whiting is limited, if not restricted, by the two following cases: Brandon *v.* Wharton, 1 B. & Ald. 463; Atkins *v.* Tredgold, 2 B. & C. 23. But in the Supreme Court of the United States, in Bell *v.* Morrison, 1 Pet. 351, the authority of Whitcomb *v.* Whiting was repudiated. The same view is supported in Van Keuren *v.* Parmelee, 2 Comst. 523. But see Bogert *v.* Vermilya, 10 Barb. 32; Dunham *v.* Dodge, id. 566; Reid *v.* McNaughton, 15 id. 168. In Shoemaker *v.* Benedict, 1 Kern. 176, it was held that payments made by one of the joint and several makers of a promissory note, before an action upon it is barred by the Statute of Limitations, and within six years before suit brought, do not affect the defence of the statute as to the others. It would seem, from the decisions in these cases, that a joint debtor is not an agent, or at least such an agent, for the rest of the debtors, that he can remove the bar of the statute for them by any word or act of his own. The law is the same in New Hampshire. Exeter Bank *v.* Sullivan, 6 N. H. 124; Kelley *v.* Sanborn, 9 id. 46; Whipple *v.* Stevens, 2 Foster, 219. So, in Tennessee, Belote *v.* Wynne, 7 Yerg. 534; Muse *v.* Donelson, 2 Humph. 166. The following cases support the opposite view: In Vermont, Joslyn *v.* Smith, 13 Vt. 353; Wheelock *v.* Doolittle, 18 id. 440. In Connecticut, Bound *v.* Lathrop, 4 Conn. 336; Coit *v.* Tracy, 8 id. 268; Austin *v.* Bostwick, 9 id. 496; Clark *v.* Sigourney, 17 id. 511. In Massachusetts, Hunt *v.* Bridgham, 2 Pick. 581; White *v.* Hale, 3 id. 291; Frye *v.* Barker, 4 id. 382; Sigourney *v.* Drury, 14 id. 387. In Maine, Getchell *v.* Heald, 7 Greenl. 26; Greenleaf *v.* Quincy, 3 Fairf. 11; Pike *v.* Warren, 15 Maine, 390; Dinsmore *v.* Dinsmore, 21 id. 433; Shepley *v.* Waterhouse, 22 id. 497. See also the recent cases of Zent *v.* Heart, 8 Penn. St. 337; Goudy *v.* Gilman, 6 Rich. 28; Bowdre *v.* Hampton, id. 208; Tillinghast *v.* Nourse, 14 Geo. 641.

[2] Bell *v.* Morrison, 1 Pet. 351; Van Keuren *v.* Parmelee, 2 Comst. 523. See also other cases cited *supra*.

[3] As in Massachusetts. See Mass. Rev. Sts. c. 120, § 18; Peirce *v.* Tobey, 5 Met. 168; Balcom *v.* Richards, 6 Cush. 360. And in Maine. See Maine Rev. Sts. c. 146, § 24; Quimby *v.* Putnam, 28 Maine, 419. And, perhaps, in some other States.

SECTION VI.

TO WHOM THE NEW PROMISE SHOULD BE MADE.

Whether the new promise must be made to the creditor himself, (or to his agent,) or is sufficient if made to a third party, as by saying, "I cannot pay you, because I owe him and shall pay him first," is not settled.[1] In Pennsylvania, it seems settled that such a promise or acknowledgment is not sufficient, and this we think the better rule.[2] But in New York, the old rule which makes such an acknowledgment sufficient, seems not to have passed away.[3] And this may be true in Massachusetts,[4] and some other States.

We should say that an admission by the maker of a negotiable promissory note to the payee, would take the case out of the statute as to all who are parties to the note after the payee, from the peculiar nature and purpose of negotiable paper.[5] But the cases are in some conflict on this point.

[1] Peters *v.* Brown, 4 Esp. 46; Mountsephen *v.* Brooke, 3 B. & Ald. 141, where defendants, in a deed to a third person, acknowledged that they owed a certain debt to the plaintiff, who was a stranger to the deed; held, that this declaration to a third person was sufficient to take the case out of the Statute of Limitations. See, to the same effect, Halliday *v.* Ward, 3 Campb. 32; Clark *v.* Hougham, 2 B. & Cr. 149; Oliver *v.* Gray, 1 H. & Gill, 204.

[2] In Kyle *v.* Wells, 17 Penn. St. 286, it was held that a declaration made by the defendant to a *stranger* to the suit or cause of action, that he owed to the plaintiff a debt "of about $800, which he intended to have settled within twelve months from that date" is not sufficient to take the case out of the Statute of Limitations. See, to the same effect, Farmers' and Mechanics' Bank *v.* Wilson, 10 Watts, 261; Morgan *v.* Walton, 4 Penn. St. 323; Christy *v.* Flemington, 10 id. 129; Gillingham *v.* Gillingham, 17 id. 302.

[3] In Watkins *v.* Stevens, 4 Barb. 168, where defendant said to a third person that he owed the plaintiffs $700 for goods received, it was held that such an acknowledgment was sufficient to restore the right of action which had been barred by the statute. Soulden *v.* Van Rensselaer, 9 Wend. 293; Bloodgood *v.* Bruen, 4 Sandf. 427.

[4] Whitney *v.* Bigelow, 4 Pick. 110.

[5] Bird *v.* Adams, 7 Geo. 505; Dean *v.* Hewitt, 5 Wend. 257; Little *v.* Blunt, 9 Pick. 488; Howe *v.* Thompson, 2 Fairf. 152; Cripps *v.* Davis, 12 M. & W. 159; Gale *v.* Capern, 1 Ad. & El. 102. But see p. 241, n. 3, *supra*.

SECTION VII.

OF ACCOUNTS BETWEEN MERCHANTS.

An important provision of the statute is that which excepts from its operation "accounts that concern the trade of merchandise, between merchant and merchant." There are three requisites before a debt is exempted from the effect of the statute, on this ground. It must be an "account;" it must "concern merchandise;" it must be "between merchants." The first question has been one of some difficulty in England, and has been there determined by a reference to the rules of pleading; that only being an account within the meaning of the statute, which would sustain an action of account, or an action on the case for not accounting.[1] Where these rules are in force in this country, they might have the same effect; but almost any transaction which was between merchants, and related to the buying and selling of merchandise, and ended in a debt, would, perhaps, be here held as an "account," within the meaning of the statute.[2]

Formerly, none were considered as "merchants" in England, who did not trade "beyond seas."[3] But the construction of this word is far more liberal there at the present time.[4] We have no exact standard or definition which will determine who is a merchant. The word "trader" is often used in this country, and sometimes as synonymous with merchant. A wide significance

[1] Inglis *v.* Haigh, 8 M. & W. 769; Cottam *v.* Partridge, 4 Scott, N. R. 819. A collection of the earlier cases may be found in Webber *v.* Tivill, 2 Saund. 121.

[2] In Spring *v.* Gray, 6 Pet. 151, *Marshall*, C. J., after quoting the language of the statute, said: "From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases, it may reasonably be conceived that the legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account." See, also, Toland *v.* Sprague, 12 Pet. 300; Didier *v.* Davison, 2 Barb. Ch. 477.

[3] Thus, in Sherman *v.* Withers, 1 Ch. Cas. 152, which was a bill in equity for an account of fourteen years' standing, it appeared that the plaintiff was an inland merchant, and the defendant, his factor. The defendant pleaded the Statute of Limitations. And "the Lord Keeper conceived the exception in the statute as to merchants' account, did not extend to this case, but only to merchants trading beyond the sea."

[4] In The Mayor, &c. *v.* Wilks, 2 Salk. 445, Lord *Holt* said: "A merchant includes all sorts of traders, as well and as properly as merchant adventurers. A merchant tailor is a common term." See a review of English cases upon this point, in Thomson *v.* Hopper, 1 Watts & Serg. 469.

of the word, but, perhaps, not too wide, would include all of those whose business it is to buy goods and sell them again, whether by wholesale or retail. In Scotland, the phrase "travelling merchant" is frequently applied to a peddler; but we do not know that it is so used here. A similar difficulty exists as to what is meant by the word "merchandise." There is here also no definite standard; but we should be disposed to include in it every thing that is usually bought and sold by merchants in the way of their business, and nothing more.[1] Thus, if a merchant sold another his horse or carriage, or a load of hay from his fields, or a picture from his house, we should say this debt would be barred by the statute, even if the charge were included in an account made up otherwise of mercantile items.

It has also been held that no account was exempted from the statute, although between merchants, and concerning merchandise, unless some item of it accrued within six years; and then that item drew in the whole account.[2] This rule or construction may not have wholly disappeared.[3] But, we think, the later as well as the better authority, both in England and in this country, and much the stronger reason, would negative this requirement, and exempt the whole of such an account, however old in all its items, from the operation of the statute.[4]

[1] In Forbes *v.* Skelton, 8 Simonds, 335, an account made up of money advanced by one party, and goods received from another, was not considered a mercantile account within the meaning of the statute. So, it was held in Spring *v.* Gray, 5 Mason, 505, 6 Pet. 151, that a special contract between ship-owners and a shipper of goods, to receive half profits, in lieu of freight, on the shipment for a foreign voyage, was not a case of "merchants' accounts," within the meaning of the statute. And *Marshall*, C. J., said: "The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them; but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business, as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise; and this trade must be, not an ordinary traffic between a merchant and any ordinary customers, but between merchant and merchant." See Watson *v.* Lyle, 4 Leigh, 236. In Farmers' and Mechanics' Bank *v.* Planters' Bank, 10 Gill & Johns. 422, it was held that the exception did not apply to transactions between banking institutions. See, also, Dutton *v.* Hutchinson, 1 Jur. 772; Smith *v.* Dawson, 10 B. Monr. 112; Lansdale *v.* Brashear, 3 Monr. 330; Patterson *v.* Brown, 6 id. 10; Coster *v.* Murray, 5 Johns. Ch. 522, 20 Johns. 576; Fox *v.* Fisk, 6 How. (Miss.) 328; Price *v.* Upshaw, 2 Humph. 142; Marseilles *v.* Kenton, 17 Penn. St. 238; Codman *v.* Rogers, 10 Pick. 118; Sturt *v.* Mellish, 2 Atk. 612; Blair *v.* Drew, 6 N. H. 235.

[2] Martin *v.* Heathcote, 2 Eden, 169; Barber *v.* Barber, 18 Ves. 286; Foster *v.* Hodgson, 19 id. 179.

[3] Watson *v.* Lyle, 4 Leigh, 236; Coster *v.* Murray, 5 Johns. Ch. 522, 20 Johns. 576; Didier *v.* Davison, 2 Barb. Ch. 477.

[4] This requirement seems to have been generally negatived in England. See Catling *v.* Skoulding, 6 T. R. 189; Robinson *v.* Alexander, 8 Bligh, 352; Inglis *v.* Haigh, 8

SECTION VIII.

OF THE OTHER STATUTORY EXCEPTIONS.

The original English statute also provides, that, if a creditor is, at the time when the cause of action accrues, a minor, or a married woman, or not of sound mind, or imprisoned, or beyond the seas, the six years do not begin to run; and he may bring his action at any time within six years, after such disability ceases to exist. And by the 4th of Anne, c. 16, s. 19, it was provided, that, if any person, against whom there shall be a cause of action, shall, when such cause accrues, be beyond the seas, the action may be brought at any time within six years after his return. These exceptions and disabilities, in both the statutes, are usually contained in our own statutes. The effect of these is, that, while the disability continues to exist, the statute does not take effect, provided the disability existed at the time the debt accrued. But it is a general rule that, if the six years begin to run, they go on without any interruption or suspension from any intervening disability.[1] Thus, if a creditor be of sound mind, or a debtor be at home, when the debt accrues, and one month afterwards the creditor becomes insane, or the debtor leaves the country, nevertheless the six years go on, and, after the end of that time, no action can be commenced for the debt. Or, if the disability exists when the debt accrues, and some months afterwards ceases, so that the six years begin to run when it ceases, and afterwards the disability recurs, it does not interrupt the six years. So, too, if there be several disabilities existing at the time the debt accrues, the statute takes no effect until all have ceased.[2] But if there be one or more disabilities at the beginning, so as to prevent the six years from running, and, before these are removed,

M. & W. 769. But the case of Tatam *v.* Williams, 3 Hare, 347, is an exception. The weight of authority in America is the same as in England. Mandeville *v.* Wilson, 5 Cranch, 15; Bass *v.* Bass, 6 Pick. 362; Coalter *v.* Coalter, 1 Rob. (Virg.) 79; Lansdale *v.* Brashear, 3 Monr. 330; Patterson *v.* Brown, 6 id. 10.

[1] Coventry *v.* Atherton, 9 Ohio, 34; Ruff *v.* Bull, 7 H. & Johns. 14; Young *v.* Mackall, 4 Maryl. 362; Smith *v.* Hill, 1 Wils. 134; Gray *v.* Mendez, Strange, 556; Prendergrast *v.* Foley, 8 Geo. 1.

[2] Jackson *v.* Johnson, 5 Cow. 74; Dugan *v.* Gittings, 3 Gill, 138; Scott *v.* Haddock, 11 Geo. 258; Butler *v.* Howe, 13 Maine, 397.

other disabilities occur, as soon as those existing at the beginning cease, the six years begin, although the others have not ceased.[1]

In this country, a rational construction has been given to the disability of being beyond seas, and its removal; and it is not understood to be terminated merely by a return of the debtor for a few days, if during those days he was not within reach.[2] If, however, the creditor knew that he had returned, or might have known it by the exercise of reasonable care and diligence, soon enough to have profited by it, this removal of the disability brings the statute into operation, although the return was for a short time only.[3] In some of our States it is, however, expressly provided that, if a defendant leaves the State after the action accrues, the time of his absence shall not be taken as any part of the period within which the action must be brought. Under this clause a question has arisen, whether successive absences can be accumulated and the aggregate deducted; but it is now quite well settled that this may be done, and that the statute is not confined to a single departure and return.[4] The question has also arisen whether this clause contemplates *temporary* absences, or only such as result from a permanent change of residence. And this has been decided differently by different courts.[5]

[1] Mercer *v.* Selden, 1 How. 37; Eager *v.* The Commonwealth, 4 Mass. 182; Dease *v.* Jones, 23 Mississippi, 133; Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Jackson *v.* Wheat, 18 Johns. 40; Doe *d.* Caldwell *v.* Thorp, 8 Ala. 253; Bradstreet *v.* Clark, 12 Wend. 602; Scott *v.* Haddock, 11 Geo. 258.

[2] In Hysinger *v.* Baltzells, 3 Gill & Johns. 158, where defendant, a resident of another State, appeared in Baltimore, where plaintiff resided, in six months after the cause of action accrued, and "purchased other goods from the plaintiff, and remained there for two days," it was held that the statute did not begin to run, because it did not appear but that the defendant made his purchase just before he left; so that the plaintiff had no opportunity to sue out a writ against him with effect. See White *v.* Bailey, 3 Mass. 271; Fowler *v.* Hunt, 10 Johns. 464; Randall *v.* Wilkins, 4 Denio, 577; State Bank *v.* Seawell, 18 Ala. 616; Byrne *v.* Crowninshield, 1 Pick. 263; Howell *v.* Burnet, 11 Geo. 303; Alexander *v.* Burnet, 5 Rich. 189; Dorr *v.* Swartwout, 1 Blatch. 179.

[3] Fowler *v.* Hunt, 10 Johns. 464; State Bank *v.* Sewell, 18 Ala. 616; Didier *v.* Davison, 2 Sandf. Ch. 61. But, from the following cases, it seems that, in order to put the statute in operation, the defendant must show that the plaintiff had knowledge of his return, or constructive notice thereof. Little *v.* Blunt, 16 Pick. 359; Hill *v.* Bellows, 15 Vt. 727; Mazozon *v.* Foot, 1 Aikens, 282.

[4] It was so decided by the Court of Appeals in New York, in the recent case of Cole *v.* Jessup, 10 How. Pr. 515, reversing the decision of the Supreme Court in the same case, in 2 Barb. 309, and overruling Dorr *v.* Swartwout, 1 Blatch. 179. And see Didier *v.* Davison, 2 Barb. Ch. 477; Ford *v.* Babcock, 2 Sandf. 518; Burroughs *v.* Bloomer, 5 Denio, 532. A similar decision has been made in New Hampshire. Gilman *v.* Cutts, 3 Fost. 376. And see Smith *v.* The Heirs of Bond, 8 Ala. 386; Chenot *v.* Lefevre, 3 Gilm. 637.

[5] In Gilman *v.* Cutts, *supra*, it was held that every absence from the State, whether temporary or otherwise, if it be such that the creditor cannot, during the time of its continuance, make legal service upon the debtor, must be reckoned. And see Valand-

This disability applies as well where the debtor is a foreigner, residing permanently abroad,[1] even if he have an agent here,[2] as to our own citizens who are only visiting abroad.

It has been held, that if there be joint creditors, all of whom are absent when the debt accrues, and one of them returns, the six years begin as to all of them.[3] And the reason is, that he may bring his action at once, and use the names of the other creditors. But it has also been held, that if several debtors are abroad, the limitation does not begin to run until all return;[4] for otherwise the creditor might be obliged to bring his action against the returning party alone, and he might be insolvent; and yet an action and judgment against him would extinguish the creditor's right of proceeding against the others.

SECTION IX.

WHEN THE PERIOD OF LIMITATION BEGINS.

It is sometimes a question from what point of time the six years are to be counted. And the general rule is, that they begin when the action might have been commenced.[5] If a credit is given, this period does not begin until the credit has expired;[6]

ingham *v.* Huston, 4 Gilm. 125. But in Wheeler *v.* Webster, 1 E. D. Smith, 1, it was held that, in order to interrupt the running of the statute, it is not sufficient to prove that the debtor, after the cause of action accrued, from time to time departed, and was repeatedly absent from the State; he must be shown to have departed from and resided out of the State.

[1] Thus in Ruggles *v.* Keeler, 3 Johns. 261, *Kent*, C. J., after speaking of the English construction of the statute, said: "The word return has never been construed to confine the proviso to Englishmen, who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners who reside always abroad." The same construction is supported in Strithorst *v.* Graeme, 3 Wils. 145, 2 Wm. Bl. 723; Lafonde *v.* Ruddock, 24 E. L. & E. 239; King *v.* Lane, 7 Missouri, 241; Tagart *v.* the State of Indiana, 15 id. 209; Estis *v.* Rawlins, 5 How. (Miss.) 258; Dunning *v.* Chamberlin, 6 Verm. 127; Graves *v.* Weeks, 19 id. 178; Chomqua *v.* Mason, 1 Gall. 342; Alexander *v.* Burnet, 5 Rich. 189. But see contrà, Snoddy *v.* Cage, 5 Texas, 106; Moore *v.* Hendrick, 8 id. 253.

[2] Wilson *v.* Appleton, 17 Mass. 180.

[3] Perry *v.* Jackson, 4 T. R. 516; Marsteller *v.* M'Clean, 7 Cranch, 156; Henry *v.* Means, 2 Hill, (S. C.) 328; Riggs *v.* Dooley, 7 B. Monr. & W. 236; Wells *v.* Ragland, 1 Swan, 501. But see contrà, Gourdine *v.* Graham, 1 Brevard, 329.

[4] Fannin *v.* Anderson, 7 Q. B. 811.

[5] Emery *v.* Day, 1 C. M. & Ros. 245; Odlin *v.* Greenleaf, 3 N. H. 270.

[6] Thus, in Witershiem *v.* Lady Carlisle, 1 H. Bl. 631, it was held that where a bill of exchange is drawn, payable at a future period, for the amount of a sum of money lent by the payee to the drawer, at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the loan was advanced; the Statute of Limitations beginning to run only from the

if a note on time be given, not until the time has expired, including the additional three days of grace;[1] if a bill of exchange be given, payable at sight, then the six years begin after presentment and demand;[2] but if a note be payable on demand,[3] or money is payable on demand,[4] then the limitation begins at once; if there can be no action until a previous demand, the limitation begins as soon as the demand is made;[5] if money be payable on the happening of any event, then the limitation begins after that event has happened.[6] If several successive credits are given, as, if a note is given which is to be renewed; or if a credit is given, and then a note is to be given; or if the credit is longer or shorter, at the purchaser's option, as, if it be agreed that a note shall be given at two or four months,—then the six years begin when the whole credit, and the longer credit has expired.[7] But a credit

time when the money was to be repaid, namely, when the bill became due. See Wheatley *v.* Williams, 1 M. & W. 533; Irving *v.* Veitch, 3 id. 90; Fryer *v.* Roe, 22 E. L. & Eq. 440.

[1] Thus, in Pickard *v.* Valentine, 13 Maine, 412, an action of assumpsit was brought by plaintiff as indorsee against defendant as drawer of a bill of exchange, payable four months after date; and it was held that the Statute of Limitations did not begin to run from the day it would have fallen due by its terms, but from the last day of grace.

[2] Holmes *v.* Kerrison, 2 Taunt. 323; Wolfe *v.* Whiteman, 4 Harring. 246.

[3] Little *v.* Blunt, 9 Pick. 488; Newman *v.* Kettelle, 13 Pick. 418; Wenman *v.* The Mohawk Ins. Co. 13 Wend. 267; Hill *v.* Henry, 17 Ohio, 9; Norton *v.* Ellam, 2 M. & W. 461.

[4] In Coffin *v.* Coffin, 7 Greenl. 298, it was held that an attorney at law is liable to an action for money collected by him, in the same manner as any other agent, and without a special demand; and the Statute of Limitations begins to run from the time he receives the money. And see Lillie *v.* Hoyt, 5 Hill, 395; Stafford *v.* Richardson, 15 Wend. 302; Hickok *v.* Hickok, 13 Barb. 632; but in Taylor *v.* Spear, 3 Eng. (Ark.) 429, and in Denton *v.* Embury, 5 id. 228, it is held that in an action against an agent or attorney, the cause of action does not accrue until demand, and consequently the Statute of Limitations does not begin to run until after demand. If no demand is made by the principal, in a reasonable time after notice of sale by the agent, the statute will begin to run. Lyle *v.* Murray, 4 Sandf. 590; McDonnell *v.* Branch Bank, 20 Ala. 313.

[5] Where it is understood that the principal should draw upon his agent after receiving a notice from him (and such is generally the understanding between a factor and his principal), the statute does not begin to run until after the demand is made; Clark *v.* Moody, 17 Mass. 145; Lyle *v.* Murray, 4 Sandf. 590; Topham *v.* Braddick, 1 Taunt. 572; Little *v.* Blunt, 9 Pick. 488. Wright *v.* Hamilton, 2 Bailey, 51, shows that the statute will not begin to run in favor of a sheriff who has received money by an execution, until the money has been demanded.

[6] Waters *v.* The Earl of Thanet, 2 Q. B. 757; Shutford *v.* Borough, Godbolt, 437; Fenton *v.* Emblers, 1 Wm. Bl. 353. And in Wilcox *v.* Plummer, 4 Peters, 172, which was an action of assumpsit to recover the amount of a loss occasioned by the neglect or unskilful conduct of the defendant, an attorney at law, it was held that the Statute of Limitations began to run as soon as the error was committed, and not afterwards, when it was made known. So in the following cases: Battley *v.* Faulkner, 3 B. & Ald. 288; Short *v.* M'Carthy, id. 626; Brown *v.* Howard, 2 Br. & Bing. 73; Granger *v.* George, 5 B. & Cr. 149; Howell *v.* Young, id. 259; Argall *v.* Bryant, 1 Sandf. 98; Troup *v.* Smith, 20 Johns. 33; Kerns *v.* Schoonmaker, 4 Ohio, 331; The Governor *v.* Gordon, 15 Ala. 72.

[7] Helps *v.* Winterbottom, 2 B. & Ad. 431.

may be given on condition; as, that a bill or note of a certain kind or amount, shall be given at once, or when the credit expires. Then if the bill or note is not given when it should be, the creditor may at once bring his action, and the limitation begins. But we should say, that if a purchaser agreed that after a certain credit he would give a certain bill or note, the seller must demand the bill or note at the proper time, and if it be refused, he has his action at once; but if there is a mere neglect, and not a refusal to give the bill or note, the credit does not expire until the period for which the bill or note should be made has expired also.

The same reason and the same rule run through many cases in which the interests of third parties are brought into question. Thus, if a surety pays for his principal, the limitation begins as soon as he pays, and begins on each payment, if there be many, as soon as each is made; for the surety may sue the principal at once.[1] If there be many sureties, and one pays at sundry times what is in the whole more than his share, he has a claim for contribution against all his co-sureties; and the statute does not begin to run against him from his first payment, but as soon as his payments, whether one or more, amount to more than his share.[2] If one lends his note, the limitation against the borrower begins when the lender is obliged to pay the note,[3] and generally, if there be any promise of indemnification, for the breach of which an action may be brought, the limitation against this action begins not until there is that actual injury or loss for which the indemnity is promised;[4] and if the promisor had a certain time in which to give the indemnity, not until that time has expired.

So, if one sells property which is partly his own and partly another's, the other is entitled to his share of the price, but not until payment is made by the buyer to the seller; and therefore the limitation does not begin until then.[5] Even if the seller takes

[1] Davies *v.* Humphreys, 6 M. & W. 153; Bullock *v.* Campbell, 9 Gill. 182; Gillespie *v.* Cresswell, 12 Gill & Johns. 36; Ponder *v.* Carter, 12 Iredell, 242.

[2] Davies *v.* Humphries, *supra.*

[3] Reynolds *v.* Doyle, 2 Scott, N. R. 45.

[4] Huntley *v.* Sanderson, 1 Cr. & M. 467; Collinge *v.* Heywood, 9 Ad. & El. 633; Gillespie *v.* Creswell, 12 Gill & Johns. 36; Sims *v.* Gondelock, 6 Rich. 100; Ponder *v.* Carter, 12 Iredell, 242.

[5] As in Miller *v.* Miller, 7 Pick. 133, where defendant, a co-tenant with the plaintiff, sold some trees growing on the land, and received payment. It was held that the

a note, the limitation does not begin from the maturity of the note, but from its payment, because only then is he liable for the share of the other.[1] But the seller may guaranty the note, or otherwise become bound to pay the other owner his share, without reference to the payment to him; and then the limitation begins as soon as he should pay.

SECTION X.

THAT THE STATUTE DOES NOT AFFECT COLLATERAL SECURITY.

It is important to remember that the Statute of Limitations does not avoid or cancel the debt, but only provides that "no action shall be maintained upon it" after a given time. But it does not follow that no right can be sustained by the debt, although the debt cannot be sued.[2] Thus, if one who holds a common note of hand, on which there is a mortgage or pledge of real or of personal property, without valid excuse neglects to sue the note for more than six years, he can never bring an action upon it; but his pledge or mortgage is as valid and effectual as it was before; and as far as it goes, his debt is secure; and for the purpose of realizing this security, by foreclosing a mortgage, for example, he may have whatever process is necessary on the note itself.

Statute of Limitations began to run from the time the defendant received the payment, and not from the time of the sale.

[1] See Miller *v.* Miller, *supra*.

[2] In Higgins *v.* Scott, 2 B. & Ad. 413, an attorney for a plaintiff had obtained a judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fi. fa.* issued against his goods, upon which the sheriff levied the damages and costs, it was held, that the attorney (though he had taken no step in the cause, or to recover his bill of costs, within six years) had still a lien on the judgment for his bill of costs, and the Court directed the sheriff to pay him the amount out of the proceeds of the goods. And see Spears *v.* Hartley, 3 Esp. 81; Mavor *v.* Pyne, 2 C. & P. 91; Williams *v.* Jones, 13 East, 450; Quantock *v.* England, 5 Burr. 2628.

CHAPTER XIV.

OF INTEREST AND USURY.

SECTION I.

WHAT INTEREST IS, AND WHEN IT IS DUE.

INTEREST means a payment of money for the use of money. In most civilized countries the law regulates this; that is, it declares how much money may be paid or received for the use of money; and this is called legal interest; and if more is paid or agreed to be paid than is thus allowed, it is called usurious interest. By interest, is commonly meant legal interest; and by usury, usurious interest.

Interest may be due, and may be demanded by a creditor, on either of two grounds. One, a bargain to that effect; the other, by way of damages for withholding money that is due. Indeed, it may be considered as now the settled rule, that wherever money is withheld which is certainly due, the debtor is to be regarded as having promised legal interest for the delay.[1] And upon this implication, as on most others, the usage of trade[2] and the customary course of dealings between the parties,[3] would have great influence.

In general, we may say that interest is allowed by law as fol-

[1] Dodge *v.* Perkins, 9 Pick. 368; Selleck *v.* French, 1 Conn. 32; Reid *v.* Rensselaer Glass Factory, 3 Cowen, 393; and sec 1 American Leading Cases, 341, where, in a note to Selleck *v.* French, the whole subject is ably considered.

[2] See Meech *v.* Smith, 7 Wend. 315. In this case A. sued B. upon an account for the transportation of a quantity of flour from Rochester to New York, and claimed interest upon the same. He offered to prove that it was the uniform custom of all those engaged in the same business to charge interest upon their accounts; and that the defendant knew this. This evidence having been rejected in the court below, it was held, that such usage being proved, the plaintiff was entitled to interest, and that the evidence should have been received; see also Koons *v.* Miller, 3 W. & S. 271.

[3] Esterly *v.* Cole, 1 Barbour, 235, 3 Comst. 502. And where it is known to one party that it is the uniform custom of the other to charge interest upon articles sold or manufactured by him after a certain time, the latter will be allowed to charge interest accordingly. McAllister *v.* Reab, 4 Wend. 483.

lows: on a debt due by judgment of court, from the rendition of judgment;[1] and on an account that has been liquidated, from the day of the liquidation;[2] for goods sold, from the time of the sale, if there be no credit, and if there be, then from the day when the credit expires;[3] for rent, from the time that it is due,[4] and this even if the rent is payable otherwise than in money, but is not so paid;[5] for money paid for another[6] or lent to another,[7] from the payment or loan.[8]

It sometimes happens that money is due, but not now payable; and then the interest does not begin until the money is

[1] Gwinn *v.* Whitaker, 1 H. & J. 754; Prescott *v.* Parker, 4 Mass. 170. And the rule applies where the original cause of action did not carry interest. Klock *v.* Robinson, 22 Wend. 157; Marshall *v.* Dudley, 4 J. J. Marsh. 244. And where partial payments have been made upon the judgment, interest is to be cast in the same manner as upon a note of hand, upon which partial payments have been made. Hodgdon *v.* Hodgdon, 2 N. H. 169.

[2] Elliott *v.* Minott, 2 McCord, 125; Liotard *v.* Graves, 3 Caines, 226; Walden *v.* Sherburne, 15 Johnson, 409; Blaney *v.* Hendrick, 3 Wils. 205. But upon an unsettled claim interest will only be allowed from the time of demand; and if no demand be proved, then from the commencement of the suit. Barnard *v.* Bartholomew, 22 Pick. 291; Gammell *v.* Skinner, 2 Gall. 45; McIlvaine *v.* Wilkins, 12 N. H. 474; Goff *v.* Rehoboth, 2 Cush. 475.

[3] Porter *v.* Munger, 22 Vt. 191; Esterly *v.* Cole, 3 Comst. 502; Bate *v.* Burr, 4 Harrington, 130.

[4] Dennison *v.* Lee, 6 G. & J. 383; Clark *v.* Barlow, 4 Johns. 183; Elkin *v.* Moore, 6 B. Monroe, 462; Buck *v.* Fisher, 4 Wharton, 516.

[5] Van Rensselaer *v.* Jewett, 5 Denio, 135, 2 Comst. 135; Lush *v.* Druse, 4 Wend. 313; Van Rensselaer *v.* Jones, 2 Barb. 643; Livingston *v.* Miller, 1 Kern. 80. But see Philips *v.* Williams, 5 Gratt. 259. In the recent case of Dana *v.* Fiedler, 1 E. D. Smith, 463, 2 Kern. 40, it was held that in an action on a contract to recover damages for the non-delivery of merchandise, the plaintiff is entitled to recover the difference between the contract price and the market value of the article at the time and place specified for its delivery, with interest thereon; and it is not within the discretion of the jury to allow interest or not; the plaintiff is legally entitled to interest.

[6] Sims *v.* Willing, 8 S. & R. 103; Gibbs *v.* Bryant, 1 Pick. 118; Goodloe *v.* Clay, 6 B. Mon. 236; Reid *v.* Rensselaer Glass Factory, 3 Cowen, 393, 5 id. 589.

[7] Liotard *v.* Graves, 3 Caines, 226; Dilworth *v.* Sinderling, 1 Binney, 488. And where one has wrongfully received or retained the money of another, interest is chargeable from the time of such unlawful receipt, or detention. Wood *v.* Robbins, 11 Mass. 504; Bedell *v.* Janney, 4 Gilman, 193; Duly *v.* Perkins, 9 Pick. 368; Hudson *v.* Tenny, 6 N. H. 456; People *v.* Gasherie, 9 Johns. 71; Crane *v.* Dygert, 4 Wend. 675. But where an account at a bank was overdrawn by accident, and there was no fraud in obtaining the money and no fault in retaining it, it was held that interest was not recoverable, until after a demand made, or some default in payment. Hubbard *v.* The Charlestown Branch R. R. Co. 11 Met. 124. So where money had been paid by mistake, it was held that interest could only be allowed from a demand and refusal. Simons *v.* Walter, 1 McCord, 97. See also King *v.* Diehl, 9 S. & R. 409.

[8] Interest is not generally recoverable upon claims for unliquidated damages, nor in actions founded on tort. Holmes *v.* Misroon, 3 Brev. 209; Hull *v.* Caldwell, 6 J. J. Marsh. 208. But although interest, *eo nomine*, is not allowed in actions of this sort, juries are sometimes at liberty to consider it in estimating the damages. See Suydam *v.* Jenkins, 3 Sandf. 614; Hyde *v.* Stone, 7 Wend. 354; Beals *v.* Guernsey, 8 Johns. 446; Kennedy *v.* Whitwell, 4 Pick. 466; Rowley *v.* Gibbs, 14 Johns. 385; Anerum *v.* Slone, 2 Speers, 594; Dox *v.* Dey, 3 Wend. 356; Arnott *v.* Redfern, 3 Bing. 353.

payable.[1] As if a note be on demand, the money is always due, but is not payable until demand; and therefore is not on interest until demand.[2] But a note payable at a certain time, or after a certain period, carries interest whether it be demanded or not.[3]

SECTION II.

OF MONEY.

The laws which regulate interest and prohibit usury are very various, and are not perhaps precisely the same in any two of our States. Formerly, usury was looked upon as so great an offence, that the whole debt was forfeited thereby. The law now, however, is,—generally, at least,—much more lenient. The theory that money is like any merchandise, worth what it will bring and no more, and that its value should be left to fix itself in a free market, is certainly gaining ground. Already there are continual efforts to change the statutes of usury, so that parties may make any bargain for the use of money which suits them; but when they make no bargain, the law shall say what is legal interest. And generally, the forfeiture is now much less than the whole debt. In our notes we state the various rules in our States, as nearly as we can ascertain them.[4]

[1] As in Henderson *v.* Blanchard, 4 Louisania An. Rep. 23, where A purchased land of B, who acted as the agent of C, and paid a part of the purchase-money down, and was to pay the balance as soon as the sale should be approved by C; it was held that inasmuch as this balance was not payable until notice was given to A of C's approval of the sale, interest could only be recovered from the date of such notice.

[2] Nelson *v.* Cartmel, 6 Dana, 7; Jacobs *v.* Adams, 1 Dallas, 52; Hunt *v.* Nevers, 15 Pick. 500; Breyfogle *v.* Beckley, 16 S. & R. 264.

[3] See Jacobs *v.* Adams, *supra;* Byles on Bills, 242, and cases there cited.

[4] In Maine, the excess above the legal rate of interest, six per cent., is not recoverable, and if paid, may be recovered back at any time within a year. Rev. Stat. of Maine, c. 69, §§ 2, 5, 8. In New Hampshire, the legal rate of interest being six per cent., the party, taking the usury, is subjected to a penalty of three times the amount of the usury taken, to be deducted from the debt. Rev. Stat. of N. H. c. 190, § 3. In Vermont, lawful interest only (six per cent.) is recoverable, and a party paying more than legal interest may recover it back. Comp. Stat. of Vt. c. 76, § 4. Seven per cent., however, may be charged upon railway bonds. In Massachusetts, a party receiving more than legal interest, six per cent., forfeits three times the amount of the unlawful interest taken. And where a party has paid more than legal interest, he may recover of the person receiving it three times the amount of the unlawful interest paid. Supplement to Rev. Sts. of Mass. (1853) c. 199. In Rhode Island, upon an usurious contract, legal interest only is recoverable; and where more than legal interest, six per cent., has been paid, it may be recovered back. Public Laws of R. I. p. 286. In Connecticut, upon usurious contracts, the legal rate of interest being six per cent., the whole interest is forfeited. Pub. Acts of Conn. (1849) c. 46. In New York, all

There is no especial form or expression necessary to constitute a usurious bargain. It is enough for this purpose [1] if there be a

usurious contracts are void, and where more than the legal rate of interest, seven per cent., has been paid, it may be recovered back. Rev. Stat. of N. Y., Pt. 2, c. 4, tit. 3. In New Jersey, the legal rate of interest being six per cent., usury avoids the whole contract. Statutes of N. J. Title 28, c. 1. However, in the township of Hoboken and in Jersey City, seven per cent. may be charged. In Pennsylvania, the party taking the usury, forfeits the amount of the money or other thing lent, one half to the State, the other to the party suing for the same. The legal rate of interest is six per cent. Laws of Penn. c. 34, § 2. It has been decided under this act that the contract itself is not void; and a party is entitled to recover the sum actually lent, together with lawful interest; otherwise the State might be deprived of its share of the penalty by the borrowers refusing to enforce the statute. Wycoff *v.* Longhead, 2 Dall. 92; Turner *v.* Calvert, 12 S. & R. 46. In Delaware, the party taking the usury, forfeits the amount of the whole debt, one half to the State, the other to the informer. The legal rate is six per cent. Laws of Delaware, p. 314. In Maryland, the excess paid above the legal rate of interest, six per cent., is recoverable back. Statutes of Maryland, c. 69. In Virginia, the party taking more than the legal rate of interest, six per cent., forfeits the whole debt. Laws of Va. 374. In North Carolina, the taking of unlawful interest renders the whole contract void. The legal rate is six per cent. Rev. Statutes of N. C. c. 117. In South Carolina, the party taking the usury forfeits the whole interest. The legal rate is six per cent. Stats. of S. C. p. 409. In Georgia, where the legal rate of interest is seven per cent., by the taking of usury the party forfeits the whole interest. Prince's Laws of Ga. p. 295. In Alabama, the interest only is ferfeited where usury is taken. The legal rate is eight per cent. In Arkansas, the legal rate is six per cent., and the taking of usury avoids the contract; but parties may agree in writing for ten per. cent. interest. Stats. of Ark. c. 90, § 2. In Florida, usury avoids the contract. The legal rate is six per cent. Statutes of Florida, c. 661. In Illinois, in all actions brought upon usurious contracts, the defendant shall recover his costs, and the plaintiff shall forfeit three times the amount of the whole interest. And a party paying more than the legal rate of interest, six per cent., may recover of the party receiving the same, three times the amount so paid. But banks may charge seven per cent., and individuals may make special contracts for ten per cent. Rev. Stats. of Ill. c. 54. In Indiana, the taking of usury causes a forfeiture of five times the amount of the whole interest. Six per cent. is the legal rate. Rev. Stats. of Ind. Art. 3, §§ 29, 30. In Iowa, where the legal rate of interest is six per cent., the taking of usury forfeits the whole interest, but ten per cent. is allowed on special contracts. Code of Iowa. In Kentucky, usury subjects the party to a forfeiture of the whole interest. The legal rate is six per cent. Stats. of Ky. vol. 2, p. 857. In Louisiana, the legal rate being five per cent., usury causes a forfeiture of the whole interest; but eight per cent. may be agreed upon by the parties. See Civil Code of La. In Michigan, seven per cent. is the legal rate of interest. Ten per cent. may be charged upon special contracts. There is no penalty for taking usury. In Mississippi, the legal rate is six per cent., and the receipt of usury forfeits the whole interest. Rev. Stats. of Miss. c. 74. Eight per cent., however, may be charged on special contracts. In Missouri, the legal rate is six per cent., and the receipt of usury forfeits the whole interest. Rev. Stats. of Missouri, c. 88. In Ohio, where the legal rate is six per cent., the receipt of usury causes a forfeiture of the whole interest; but eight per cent. is chargeable upon special contracts. Rev. Stats. of Ohio, c. 60. In Tennessee, six per cent. is the legal rate, and an excess avoids the whole interest. Statutes of Tenn. c. 50. In Texas, the taking of usury avoids the whole interest. The legal rate is eight per cent., but on special contracts twelve per cent. is chargeable. In Wisconsin, the legal rate is seven per cent., but special contracts may be made for twelve per cent. Rev. Stats. of Wis. c. 45. In California, the legal rate is ten per cent., and there is no penalty for taking usury.

[1] Burton's case, 5 Rep. 69; Symonds *v.* Cockerill, Noy, 151; Marsh *v.* Martindale, 3 B. & P. 160. In Richards *v.* Brown, Cowper, 776, Lord *Mansfield* said: "The question is, what was the substance of the transaction, and the true intent and meaning of the parties? For they alone are to govern, and not the words used." See also the opinion of *Marshall*, C. J., in Scott *v.* Lloyd, 9 Peters, 446; Tate *v.* Wellings, 3 T. R. 531; Chesterfield *v.* Janssen, 1 Atk. 340; Lawley *v.* Hooper, 3 Atk. 278; Hammett *v.* Yea, 1

substantial payment or promise of payment, of more than the law allows, either for the use of money lent,[1] or for the forbearance of money due and payable.[2] One thing, however, is certain: there must be an usurious intention, or there is no usury.[3] That is, if one miscalculates, and so receives a promise for more than legal interest, the error may be corrected, the excess waived, and the whole legal interest claimed.[4] But if one makes a bargain for more than legal interest, believing that he has a right to make such a bargain, or that the law gives him all that he claims, this is a mistake of law, and does not save the party from the effect of usury.[5]

B. & P. 151; Douglass *v.* McChesney, 2 Rand. 109; Andrews *v.* Pond, 13 Peters, 65; Tyson *v.* Rickard, 3 H. & J. 109; Bank of U. S. *v.* Owens, 2 Peters, 536; Seymour *v.* Strong, 4 Hill, 255; Shober *v.* Hauser, 4 Dev. & Bat. 91; Clarkson *v.* Garland, 1 Leigh, 147; Steptoe *v.* Harvey, 7 Leigh, 501; Drew *v.* Power, 1 Sch. & Lef. 182; Dowdall *v.* Lenox, 2 Edws. Ch. 267; Brown *v.* Waters, 2 Md. Ch. Dec. 201; Wright *v.* McAlexander, 11 Alab. 236; Williams *v.* Williams, 3 Green, 255; Pratt *v.* Adams, 7 Paige, 616.

[1] Thus, where a purchaser, at the time of the sale, reserved to himself the right of returning the thing purchased, and then compelling the vendor to repay the consideration with more than lawful interest, it was held, that the whole contract was usurious. Delano *v.* Rood, 1 Gilman, 690. And see cases cited in preceding note.

[2] The following cases hold that a contract for the payment of illegal interest for the forbearance of an existing debt, or the actual payment of money for such forbearance, constitutes usury. Craig *v.* Hewitt, 7 B. Mon. 475; Young *v.* Miller, 1 id. 540; Parker *v.* Ramsbottom, 5 D. & Ry. 138; Evans *v.* Negley, 13 S. & R. 218; Hancock *v.* Hodgson, 3 Scam. 333; Carlis *v.* M'Laughlin, 1 Chip. 112; Seneca County Bank *v.* Schermerhorn, 1 Denio, 135; Gray *v.* Belden, 3 Flor. 110.

[3] In 1 Freeman, 253, *North*, C. J., said: "If a scrivener in making a mortgage, &c., do through mistake make the money payable sooner than it ought to be, or reserve more interest than ought to be, this will not make it void within the statute, because there was no corrupt agreement." And see, also, Marvine *v.* Hymers, 2 Kern. 223; Gibson *v.* Stearns, 3 N. H. 185; Livingston *v.* Bird, 1 Root, 303; Lloyd *v.* Scott, 4 Pet. 224; Nevison *v.* Whitley, Cro. Car. 501; Buckley *v.* Guildbank, Cro. Jac. 678; Doe *d.* Metcalf *v.* Brown, Holt. N. P. 295.

[4] Marvine *v.* Hymers, 2 Kern. 223; Glassfurd *v.* Laing, 1 Campb. 149; Childers *v.* Deane, 4 Rand. 406.

[5] Thus, in Maine Bank *v.* Butts, 9 Mass. 49, where the defendant agreed to pay the plaintiffs more than the legal rate of interest, but the excess was owing to the mode of computation adopted by the plaintiffs, and which was usual among banks, *Sewall*, J., said: "It is probable that in this case there was no intentional deviation on the part of the bank; but a mistake of their right. This, however, is a consideration, which must not influence our decision. The mistake was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rule of interest was proved, but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged in this respect to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement; for ignorance of the law will not excuse."

The question has been much discussed whether the use of tables calculated on the supposition that a year consists of 360 days, is usurious. In New York, it is held that it is. See New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678; Utica Ins. Co. *v.* Tillman, 1 Wend. 555; Bank of Utica *v.* Wagar, 8 Cow. 398. But in Massachusetts and some other States, it is held that the use of such tables does not render the transaction usurious. See Agricultural Bank *v.* Bissell, 12 Pick. 586; Bank of St. Albans *v.* Scott, 1 Vt. 426; Duncan *v.* Maryland Savings Institution, 10 G. & J. 299; Duvall *v.* Farmers Bank, 7 G. & J. 44; Planters Bank *v.* Snodgrass, 4 How. (Miss.) 573; Lyon *v.* State Bank, 1 Stewart, 442; State Bank *v.* Cowan, 8 Leigh, 253. We think this latter the better opinion.

It is also settled, that only the contract which is itself usurious can be affected by the usury.[1] If by one contract, or by one completed transaction, as the payment of a debt for another, a party acquires a valid claim for a certain amount, and lawful interest, and then by a new contract, as a new note for instance, the debtor agrees to pay him usurious interest, this new note, it has been held, will be affected by the usury, but the original claim will not be.[2] So, if a borrower promises to pay a certain sum, and then more than interest, as a penalty if he does not pay the first sum, this is not usurious; first, because by paying the first sum he can escape the penalty; and secondly, because all penalties are reducible by the court to the sum originally due, and interest.[3] So, if a debtor requests time, and promise to pay for

[1] Anon. 1 Bulstrode, 17. In this case the defendant borrowed £60 of the plaintiff, for one year, at the legal rate of interest. Several days before the end of the year, he paid the plaintiff the interest for the whole year, but failed to pay the principal when it became due; to recover which the present action was brought. The defendant set up the defence of usury, contending that the plaintiff had taken above ten pounds in the hundred, because he received his interest within the year. But it was resolved that this was no usury. And *Williams*, J., said: "Where the first contract is not usurious, this shall never be made usury within the statute by matter *ex post facto;* as if one contract with another to borrow £100 for a year, and to give him £10 for interest at the end of the year; if he pays the interest within the year, this is not usury within the statute to avoid the obligation, or to give a forfeiture of the money within the statute, because this contract was not usurious at the beginning." And in Ferrall *v.* Shaen, 1 Saund. 294, which was debt upon a bond, to which the defendant pleaded that after the making of the bond, the plaintiff had received more than the legal rate of interest, and the plaintiff demurred, the court adjudged for the plaintiff. See also Nichols *v.* Lee, 3 Anst. 940, where to debt upon a bond the defendant pleaded the subsequent receipt of usury. And per *Mœ Donald,* C. B.: "There is nothing more settled than this point. To avoid a security as usurious, you must show that the agreement was illegal from its origin." And the following cases will be found to establish the same doctrine: Radley *v.* Manning, 3 Keble, 142; Parr *v.* Eliason, 1 East, 92; Ballard *v.* Oddey, *supra;* Rex *v.* Allen, T. Raym. 196; Parker *v.* Ramsbottom, 3 B. & Cr. 257; Gray *v.* Fowler, 1 H. Black. 462; Phillips *v.* Cockayne, 3 Camp. 119; Daniel *v.* Cartony, 1 Esp. 274; Bush *v.* Livingston, 2 Caines's Cases in Error, 66; Nichols *v.* Fearson, 7 Pet. 103; Pollard *v.* Baylors, 6 Munf. 433; Merrils *v.* Law, 9 Cow. 65; Rice *v.* Welling, 5 Wend. 597; Crane *v.* Hubbel, 7 Paige, 417; Brown *v.* Dewey, 1 Sandf. Ch. 56; Gaither *v.* F. & M. Bank, 1 Pet. 43; Gardner *v.* Flagg, 8 Mass. 101; Edgell *v.* Stanford, 6 Vt. 551; Sloan *v.* Sommers, 2 Green, N. J. 509; Indianapolis Ins. Co. *v.* Brown, 6 Blackf. 378; Collier *v.* Nevill, 3 Dev. 32; Vareck *v.* Crane, 3 Green's Ch. 128; Brown *v.* Toells's Admr. 5 Rand. 543; Abrahams *v.* Bunn, 4 Burr. 2253.

[2] Hughes *v.* Wheeler, 8 Cowen, 77; Johnson *v.* Johnson, 11 Mass. 359; Edgell *v.* Stanford, *supra.*

[3] In Burton's case, 5 Rep. 69, where a rent of £20 was granted in consideration of £100 lent, and the first payment was to be made more than a year and a quarter after making the grant, and there was a condition in the deed that the rent should cease if the grantor should repay the £100 in twelve months, it was held that the transaction was not usurious, because it was at the election of the grantor to repay the £100, and thus defeat the rent. And in Floyer *v.* Edwards, Lofft, 596, Lord *Mansfield* said: "An actual borrowing of money, with a penalty on forbearance, is no usury, if the borrower can discharge himself within the time." And in Shuck *v.* Wight, 1 Greene, (Iowa,) 128, it was held that a note payable two years after date, to bear interest at fifty per cent. after it was due until paid, was not usurious. See also Vin. Abr. Usury (C.) Roberts *v.* Trenayne, Cro. Jac. 507; Garret *v.* Foot, Comb. 133; Groves *v.* Graves,

the forbearance legal interest, and as much more as the creditor shall be obliged to pay for the same money, this is not a usurious contract.[1] And even if usurious interest be actually taken, this, although very strong evidence of an original usurious bargain, is not conclusive, but may be rebutted by adequate proof or explanation.[2]

When a statute provides that a usurious contract is wholly void, such a contract cannot become good afterwards; and therefore a note which is usurious, if therefore void in its inception, is not valid in the hands of an innocent indorsee.[3] But if a note, or any securities for a usurious bargain, be delivered up by the creditor and cancelled, and the debtor thereupon promises to pay the original debt and lawful interest, this promise is valid.[4]

New securities for old ones which are tainted with usury, are equally void with the old ones, or subject to the same defence.[5]

1 Wash. 1; Winslow *v.* Dawson, 1 Wash. 118; Cutler *v.* How, 8 Mass. 257; Pollard *v.* Baylors, 6 Munf. 483; Brock *v.* Thompson, 1 Bailey, 322; Campbell *v.* Shields, 6 Leigh, 517; Gambril *v.* Rose, 8 Blackf. 140; Long *v.* Storie, 10 E. L. & E. 182; Lawrence *v.* Cowles, 13 Ill. 577; Moore *v.* Hylton, 1 Dev. Eq. 429; Call *v.* Scott, 4 Call, 409; Brockway *v.* Clark, 6 Ham. 45.

[1] Kimball *v.* Proprietors of the Boston Athæneum, decided by the S. J. C. of Massachusetts, in March, 1855. The principal ground of the decision was, that the gist of all the usury laws from 1641 to 1846, is the taking of unlawful profits, and here there is no taking of any profit by the creditor, who is, in fact, the agent of the debtor for raising the money.

[2] Thus, in Fussil *v.* Brookes, 2 C. & P. 318, which was an action of debt upon a bond for the payment of money with 5*l.* per cent. interest, it was held that proof that the obligee had received interest on the bond at 7 1-2*l.* per cent., would not avoid the bond, unless the jury were satisfied that it was agreed at or before the execution of the bond, that more than 5*l.* per cent. should be paid. And see New York Fireman's Ins. Co. *v.* Ely, 2 Cow. 705; Hammond *v.* Smith, 17 Vt. 231; Cummins *v.* Wire, 2 Halsted's Ch. 73; Varick *v.* Crane, 3 Green's Ch. 128; Quarles *v.* Brannon, 5 Strobh. 151.

[3] Thus, in Lowe *v.* Waller, Doug. 736, where the plaintiff was the indorsee of a bill of exchange originally made upon an usurious contract, although he received it for a valuable consideration, and was entirely ignorant of its vice, the Court of King's Bench, after great consideration, held that inasmuch as the statute made all usurious contracts void, the plaintiff could not recover. See also Ackland *v.* Pearce, 2 Camp. 599; Wilkie *v.* Roosevelt, 3 Johns. Cas. 66; Shober *v.* Hauser, 4 Dev. & Bat. 91; Chadbourn *v.* Watts, 10 Mass. 121; Hackley *v.* Sprague, 10 Wend. 113; Lloyd *v.* Scott, 4 Pet. 228; Bridge *v.* Hubbard, 15 Mass. 96; Faris *v.* King, 1 Stewart, 255; Payne *v.* Trezevant, 2 Bay, 23; Gaillard *v.* Le Seigneur, 1 McMullan, 225; Townsend *v.* Bush, 1 Conn. 260. But it is otherwise, if the statute does not declare the contract void on account of the usury. Young *v.* Berkley, 2 N. H. 410; McGill *v.* Ware, 4 Scam. 21; Tucker *v.* Wilamouicz, 3 Eng. (Ark.) 157; Creed *v.* Stevens, 4 Whart. 223; Turner *v.* Calvert, 12 S. & R. 46; Fenno *v.* Sayre, 3 Alab. 458; per *Story*, J., in Fleckner *v.* N. S. Bank, 8 Wheat. 354.

[4] Thus, in Barnes *v.* Hedley, 2 Taunt. 184, where the parties had made and acted upon an usurious agreement, but had afterwards stated an account, and agreed upon the sum that would be due for the principal with legal interest, after deducting all that had been paid for usurious interest, and a new promise was made to pay that sum, it was held that such promise was free from the original usury, and was valid in law. See Wicks *v.* Gogerley, 1 Ry. & Moody, 123. And see *infra*, p. 258, n. 1.

[5] In Tuthill *v.* Davis, 20 Johns. 285, where a new note, without any new considera-

Not so, however, if the usurious part of the original securities be expunged, and not included in the new;[1] or if the new ones are given to third parties, who are wholly innocent of the original usurious transaction.[2] And if a debtor suffer his usurious debt to be merged in a judgment against him, it is then too late for him to take advantage of the usury.[3]

So, if land or goods be mortgaged to secure a usurious debt, and afterwards conveyed to an innocent party, subject to such mortgage, the latter cannot set up the defence of usury in answer

tion, was given to take up a note tainted with usury, which was in the hands of the original party to the usurious contract, it was held that the last note was tainted with the usury of the first. And in Walker *v.* Bank of Washington, 3 How. 62, *Wayne*, J., said: "The mere change of securities for the same usurious loan, to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void." See also Preston *v.* Jackson, 2 Stark. 237; Pickering *v.* Banks, Forrest's Reps. 72; Chapman *v.* Black, 2 B. & Ald. 589; Bridge *v.* Hubbard, 15 Mass. 96; Simpson *v.* Fullenwider, 12 Ired. 338; Hazard *v.* Smith, 21 Vt. 123; Jackson *v.* Jones, 13 Alab. 121; Torrey *v.* Grant, 10 Sm. & M. 89; Lowell *v.* Johnson, 14 Maine, 240; Warren *v.* Crabtree, 1 Greenl. 167; Wales *v.* Webb, 5 Conn. 154; Botsford *v.* Sanford, 2 Conn. 276; Scott *v.* Lewis, id. 135; Moncure *v.* Dermott, 13 Peters, 345; Steele *v.* Whipple, 21 Wend. 103; Jackson *v.* Packard, 6 Wend. 415; Reed *v.* Smith, 9 Cow. 647; Powell *v.* Waters, 8 Cow. 685; Marsh *v.* Martindale, 3 B. & P. 154; Edwards *v.* Skirving, 1 Brev. 548.

[1] See Wright *v.* Wheeler, 1 Camp. 165, n. In this case, it appeared that the plaintiff had in 1791 lent the defendant £1,000, for the security of which, with lawful interest, a bond was given, and the defendant also agreed to give the plaintiff a salary of £50 a year, as a clerk in his brewery. It was not intended that the plaintiff should perform any service for the defendant there, but the salary was a mere shift, to give the plaintiff more than lawful interest for his money. In 1793, one year's salary having been paid, the parties agreed that it should be deducted from the principal, the deed securing the salary cancelled, and a fresh bond taken for the remaining principal, with 5 per cent. interest; and on this bond the present action was brought. *Lawrence*, J., said: "The act of Parliament only makes void contracts whereby more than 5 per cent. is secured. The original contract between these parties was certainly usurious, and no action could have been maintained on the first bond; but there was nothing illegal in the last bond; it was not made to assure the performance of the first contract, nor does it secure more than 5 per cent. interest to the plaintiff. The parties saw they had before done wrong; they rectified the error they had committed, and substituted for an illegal contract one that was perfectly fair and legal. I see no objection to their doing that, and therefore am of opinion that the present action is maintainable." M'Clure *v.* Williams, 7 Vt. 210. Where the maker of a note infected with usury, in consideration that the holder should cancel the same, promised to give a new note deducting the usurious excess, and it was held such promise was enforceable in law. See also De Wolf *v.* Johnson, 10 Wheaton, 367; Cummins *v.* Wire, 2 Hals. Ch. 73; Postlethwaite *v.* Garrett, 3 Mon. 345; Bank of Monroe *v.* Strong, Clarke, 76; Chadbourn *v.* Watts, 10 Mass. 121; Hammond *v.* Hopping, 13 Wend. 505; Miller *v.* Hull, 4 Denio, 104. And see *supra*, p. 257, n. 4.

[2] Thus, where A made an usurious note to B, who transferred it to C for a valuable consideration, without notice of the usury, and afterwards A gave a bond to C for the amount, the bond was held not to be affected with the usury. Cuthbart *v.* Haley, 8 T. R. 390. And see per *Kent*, C. J., in Jackson *v.* Henry, 10 Johns. 185; Ellis *v.* Warnes, Cro. Jac. 33; Powell *v.* Waters, 8 Cowen, 669; Wales *v.* Webb, 5 Conn. 154; Brown *v.* Waters, 2 Maryl. Ch. Decis. 201; Aldrich *v.* Reynolds, 1 Barb. Ch. 43.

[3] Day *v.* Cummings, 19 Vt. 496; Thatcher *v.* Gammon, 12 Mass. 268; Thompson *v.* Berry, 3 Johns. Ch. 395; Jackson *v.* Bowen, 7 Cow. 20; Jackson *v.* Henry, 10 Johns. 185.

to an action to enforce the mortgage.[1] And if A owes B a usurious debt, against which A could make a complete or partial defence, but pays the debt, usury and all, by transferring to B a valid note or debt of C, then when C is called upon to pay this debt to B, C cannot make the defence which A could have done; for the debt due from C is not affected by the usurious taint of the original debt from A to B.[2]

Usurers resort to many devices to conceal their usury; and sometimes it is very difficult for the law to reach and punish this offence. A common method is for the lender of money to sell some chattel, or a parcel of goods, at a high price, the lender paying this price in part as a premium for the loan.[3] In England it would seem from the books to be quite common for one who discounts a note, to do this nominally at legal rates, but to furnish a part of the amount in goods at a very high valuation.[4] In all cases of this kind, or rather in all cases where questions of this kind arise, the court endeavors to ascertain the real character of the transaction.[5] It is always suspicious, for the obvious reason

[1] Mechanics' Bank *v.* Edwards, 1 Barb. 271; Green *v.* Kemp, 13 Mass. 515; Stoney *v.* Am. Life Ins. Co. 11 Paige, 635; Sands *v.* Church, 2 Seld. 347.

[2] Stanley *v.* Kempton, 30 Maine, 118; Marchant *v.* Dodgin, 2 M. & Scott, 632.

[3] See Pratt *v.* Willey, 1 Esp. 40, where to an action upon a promissory note usury was pleaded, the defendant attempted to prove that the plaintiff had, in discounting the note, given in part payment a diamond ring, for which he charged much more than its actual value. It was said by *Erskine*, of counsel for the plaintiff, and assented to by Lord *Kenyon*, that his lordship and Mr. Justice *Buller* had ruled on former occasions, that if, in discounting a bill, the party discounting it gives goods in part; that if these goods are of a certain ascertained value, and given at that value, that is not usury; but if the party so discounting the bill makes the holder of it take the goods at a higher value, that shall be deemed usury; for a party, by substituting goods for money, shall not, by color of their pretended value, take above legal interest, and evade the statute. And in Doe d. Davidson *v.* Barnard, 1 Esp. 11, where a loan was effected by the borrower's taking stock at 75 per cent., when it was worth only 73 per cent., Lord *Kenyon* held the transaction usurious. See also Lowe *v.* Waller, Doug. 736; Barker *v.* Vansommer, 1 Brown's Ch. 149. And where upon a contract or loan, property of any kind is received of less value than the actual value of the loan, the transaction is usurious. Morgan *v.* Schermerhorn, 1 Paige, 544; Delano *v.* Rood, 1 Gilman, 690; Grosvenor *v.* Flax & Hemp Manuf. Co. 1 Green's Ch. 453; Valley Bank *v.* Stribbling, 5 Rand. 182; Moore *v.* Vance, 3 Dana, 361; Warfield *v.* Boswell, 2 Dana, 224; Burnham *v.* Gentrys, 7 Monroe, 354; Collins *v.* Secrel, ib. 335; Weatherhead *v.* Boyers, 7 Yerger, 545; Pratt *v.* Adams, 7 Paige, 615; Eagleson *v.* Shotwell, 1 Johns. Ch. 536; Ehringhaus *v.* Ford, 3 Ired. 522; Stribbling *v.* Bank of the Valley, 5 Rand. 132; Douglass *v.* McChesney, 2 Rand. 109; Dry Dock Bank *v.* Life Ins. & Trust Co. 3 Comst. 344; Rose *v.* Dickson, 7 Johns. 196; Swanson *v.* White, 5 Humph. 373; Greenhow *v.* Harris, 6 Munf. 472; Bank of U. S. *v.* Owens, 2 Peters, 527; Archer *v.* Putnam, 12 S. & M. 286. But if the transaction is a *bonâ fide* sale, the law does not prohibit the sale of depreciated stock or bank notes at more than their par value. Bank of United States *v.* Wagener, 9 Peters, 400; Willoughby *v.* Comstock, 3 Edws. Ch. 424; Slosson *v.* Duff, 1 Barb. 432.

[4] See cases cited in preceding note.

[5] Andrews *v.* Pond, 13 Peters, 76; Beete *v.* Bidgood, 7 B. & Cr. 458.

that one who wants to borrow money, is not very likely to desire at the same time to buy goods at a high price. But the jury decide all questions of this kind; and it is their duty to judge of the actual intention of the parties, from all the evidence offered.[1] If that intention is substantially that one should loan his money to another, who shall therefor, in any manner whatever, pay to the lender more than legal interest, it is a case of usury. "Where the real truth is a loan of money," said Lord *Mansfield*,[2] "the wit of man cannot find a shift to take it out of the statute." If this great judge meant only that whenever legal evidence shows the transaction to be a usurious loan, the law pays no respect whatever to any pretence or disguise, this is certainly true. But the wit of man does undoubtedly contrive some "shifts," which the law cannot detect. There seems to be a general rule in these cases in reference to the burden of proof; the borrower must first show that he took the goods on compulsion; and then it is for the lender to prove that no more than their actual value was received or charged for them.[3]

If one should borrow stock at a valuation much above the market rate, and agree to pay interest on this value for the use of the stock to sell or pledge, this would be usurious.[4] Whether it would be sufficient to discharge this taint, for the lender to show that the dividends on the stock actually were, and were expected to be, as high as the interest on the valuation, so that he makes no gain by the transaction, may not be certain.

So, one may lend his stock, and give the borrower the option

[1] Thus, in Doe d. Metcalf *v.* Browne, 1 Holt, N. P. 295, where A, in consideration of a certain sum of money, conveyed premises to B, and at the same time an agreement was entered into between them that A should repurchase the same premises within fifteen months, at a considerable advance upon the original purchase-money, and B agreed to sell and reconvey at such advance, it was held, that in point of law, such contract was not usurious, unless it was meant as a cover for a loan of money, which was a question of fact for the jury. And see Andrews *v.* Pond, *supra;* Stevens *v.* Davis, 3 Metc. 211; Carstairs *v.* Stein, 4 M. & S. 192; Smith *v.* Brush, 8 Johns. 84; Thomas *v.* Cartheral, 5 G. & J. 23; Tyson *v.* Rickard, 3 H. & J. 109.

[2] In Floyer *v.* Edwards, Cowp. 112.

[3] See per Lord *Ellenborough*, in Davis *v.* Hardacre, 2 Camp. 375; Rich *v.* Topping, 1 Esp. 176; Hargreaves *v.* Hutchinson, 2 Ad. & E. 12. But in Grosvenor *v.* The Flax & Hemp Manuf. Co. 1 Green's Ch. 453, it was held that proof that part of the loan was advanced in goods or stock, would not throw on the opposite party the burden of proving the value of such goods or stock; but the party charging the usury must not only prove that the goods or stock constituted a part of the loan, but also that they were put off at a price beyond their value.

[4] Parker *v.* Ramsbottom, 3 B. & Cr. 257. In Astor *v.* Price, 7 Martin, N. S. 408, it was held that where the lender gave bank shares, and charged interest upon them at a higher price than that of the market, the contract was usurious.

to replace the stock,[1] or to pay for it at even a high value, with interest.[2] But if he reserves this option to himself, the bargain is usurious, because it gives the lender the right to claim more than legal interest.[3] So, the lender may reserve either the dividends or the interest, if he elects at the time of the loan;[4] but he cannot reserve the right of electing at a future time, when he shall know what the dividends are.

A contract may seem to be two, and yet be but one, if the seeming two are but parts of a whole.[5] Thus, if A borrows one thousand dollars, and gives a note promising to pay legal interest for it, and then gives another note for (or otherwise promises to pay) a further sum, in fact for no consideration but the loan, this is all one transaction, and it constitutes an usurious contract.[6]

But if there be a loan on legal terms, with no promise or obligation on the part of the borrower to pay any more, this would

[1] Forrest *v.* Elwes, 4 Vesey, 492.

[2] In Tate *v.* Wellings, 3 T. R. 531, A lent money to B, which was produced by the sale of stocks, on an agreement that B should replace the stock by a certain day, or repay the money on a subsequent day, with such interest as the stock itself would have produced in the meantime. The jury having found that the transaction was an honest loan of stock, the court refused to set aside the verdict. And per *Ashurst*, J.: "The agreement was, that the defendant should have the use of the money, which was the produce of the stock, paying the same interest which the stock would have produced, with liberty to replace the stock on a certain day, till which day the lender was to run the risk of a fall in the stocks; but he stipulated that, if it were not replaced by that time, he would not run that risk any longer, but would be repaid the sum advanced at all events. And from this contract he derived no advantage, for he was only to receive in the meantime the same interest which the stock would have produced."

[3] Thus, in White *v.* Wright, 3 B. & Cr. 273, where A loaned stock to B, and reserved the dividends to himself by way of interest, and also the option of deciding at a future day whether he would have the stock replaced, or the sum arising from the sale of it repaid to him in money, with 5 per cent. interest, the court held the transaction usurious, and per *Bayley*, J.: "It is not illegal to reserve the dividends by way of interest for stock lent, although they may amount to more than 5*l.* per cent. on the produce of it, for the price of the stock may fall, and the borrower would then be the gainer; but the option must be made at the time of the loan. The instruments set out in this case, show that an option to be exercised in the future was reserved. It has been argued that the agreement enabled the defendant, at all events, if she chose, to replace the stock; but the agreement is to replace it *if required*, and the bond gave the lender power to enforce the repayment of the principal, which was never put in hazard. Upon principle, therefore, as well as on the authority of Barnard *v.* Young, 17 Ves. 44, I think that the plaintiffs are not entitled to recover in this action." See also, to the same effect, Barnard *v.* Young, 17 Ves. 44; Chippindale *v.* Thurston, 1 M. & Mal. 411.

[4] Potter *v.* Yale College, 8 Conn. 52; White *v.* Wright, *supra*.

[5] See Warren *v.* Crabtree, 1 Greenleaf, 171.

[6] See White *v.* Wright, 5 B. & Cr. 273; Swartwout *v.* Payne, 19 Johnson, 294; Clark *v.* Badgley, 3 Halst. 233; Postlethwaite *v.* Garrett, 3 Monroe, 345; Fitch *v.* Hamlin, 1 Root, 110; Gray's Ex'rs *v.* Brown, 22 Alab. 273; Lear *v.* Yarnel, 3 A. K. Marsh. 419; Willard *v.* Reeder, 2 McCord, 369. And it has been held, that if the promise to pay the usury be by parole, the principal agreement being in writing, this would avoid the whole contract. Macomber *v.* Dunham, 8 Wend. 550; Hammond *v.* Hopping, 13 Wend. 505; Merrills *v.* Law, 9 Cow. 65; *contrà*, Butterfield *v.* Kidder, 8 Pick. 512.

not be invalidated by a mere understanding that the borrower would, when the money was paid by him, make a present to the lender for the accommodation. And if, after a payment has been made, which discharged all legal obligation, the payer voluntarily adds a gift, this would not be usurious. But in every such case the question for a jury is, what was this additional transfer of money, in fact; was it a voluntary gift, or was it the payment of a debt?

A foreign contract, valid and lawful where made, may be enforced in a State in which such a contract, if made there, would be usurious.[1] But if usurious where it was made, and, by reason of that usury, wholly void in that State, if it is put in suit in another State where the penalty for usury is less, it cannot be enforced under this mitigated penalty, but it is wholly void there also.[2]

SECTION III.

OF A CHARGE FOR RISK OR FOR SERVICE.

It is undoubtedly lawful for a lender to charge an extra price for the risk he incurs, provided that risk be perfectly distinct from the merely personal risk of the debtor's being unable to pay. If any thing is paid for this risk, it is certainly usury. But if it is a part of the bargain that the debt shall not be paid if a vessel or goods do not arrive in safety, as is the case in a loan on bottomry, or on respondentia, (as we state in our chapter on the Law of Shipping,) this is not usury.[3] And by the same prin-

[1] Turpin *v.* Povall, 8 Leigh, 93; Davis *v.* Garr, 2 Seld. 124; Harvey *v.* Archbold, 3 B. & Cr. 626; Thompson *v.* Powles, 2 Sim. 211; De Wolf *v.* Johnson, 10 Wheat. 367; Pratt *v.* Adams, 7 Paige, 615; Nichols *v.* Cosset, 1 Root, 294; M'Queen *v.* Burns, 1 Hawks, 476; Gale *v.* Eastman, 7 Metc. 14; M'Guire *v.* Parker, 1 Wash. 368.

[2] Houghton *v.* Page, 2 N. H. 42.

[3] In Soome *v.* Gleen, 1 Sid. 27, which was debt upon a bond, the condition of the bond was, that, if a certain ship should go to the East Indjes, and return safely to London, or if the owner or the goods should return safe, the defendant should pay the plaintiff the principal, together with £40 for every £100; but if the ship, &c., should perish by fire, &c., then the plaintiff should have nothing. It was objected that the contract was usurious. But the court held that such contracts, called "bottomry," tend to the increase of trade, and that they were not usurious. See also, to the same effect, Sharpley *v.* Hurrel, Cro. Jac. 208; Chesterfield *v.* Janser, 1 Wils. 286, 1 Atk. 342; Roberts *v.* Tremayne, Cro. Jac. 507; Rucher *v.* Conyngham, 1 Pet. Adm. 295; The Sloop Mary, 1 Paine, C. C. 675; Thorndike *v.* Stone, 11 Pick. 183.

ciple, if one buys an annuity to end at the annuitant's death,[1] or a life-estate,[2] even on exorbitant and oppressive terms, against which a court of equity would relieve, still, it is not a usurious contract, provided the purchase be actual, and not a mere disguise.

So, one may charge for services rendered,[3] for brokerage,[4] or for rate of exchange,[5] and may even cause a domestic loan or discount to be actually converted into a foreign one, so as to charge the exchange; and this would not be usurious.[6] But here, as before, and, indeed, throughout the law of usury, it is necessary to remember that the actual intention, and not the apparent purpose or the form of the transaction, must determine its character. So, if one lends money to be used in business, and lends it upon such terms that he becomes a partner in fact with

[1] Fountain *v.* Grymes, 1 Bulstrode, 36. The plaintiff, in his case, lent the defendant £100, who therefore executed to the plaintiff a bond, which was conditioned for the payment to the plaintiff of £20 a year for three lives, and no mention was made of the return of the principal sum; it was held that this was not within the statute, and judgment was given for the plaintiff. See, also, Roberts *v.* Tremoille, 1 Rolle, 47; Floyer *v.* Sherard, Ambler, 18; Lloyd *v.* Scott, 4 Pet. 205. But, in Richards *v.* Brown, Cowper, 770, it was held that an annuity upon the borrower's life, with a right to redeem within three months, was usurious, as involving only the contingency of the borrower's dying within the three months. Murray *v.* Harding, 2 Black. 859; King *v.* Drury, 2 Lev. 7; White *v.* Wright. 3 B. & Cr. 273.

[2] Symonds *v.* Cockerill, Noy, 157; Cotterel *v.* Harrington, Brownl. Golds. 180; Fuller's case, 4 Leon. 208; King *v.* Drury, 2 Lev. 7. But see Doe *v.* Gooch, 3 B. & Ald. 664.

[3] Thus, where A received of B a sum exceeding the lawful rate of interest, as compensation for obtaining money for him at a bank, on A's own security, this was held not to constitute usury. Hutchinson *v.* Hosmer, 2 Conn. 341. See, also, Harris *v.* Boston, 2 Camp. 348; *Ex parte* Patrick, 1 Mont. & Ayr. 385; Brown *v.* Harrison, 17 Ala. 774; Rowland *v.* Bull, 5 B. Mon. 146; M'Kesson *v.* M'Dowell, 4 Dev. & Bat. 120; Auriol *v.* Thomas, 2 T. R. 52; Coliot *v.* Walker, 2 Anstruther, 496; Hammett *v.* Yea, 1 B. & P. 156; Masterman *v.* Cowrie, 3 Camp. 488; *Ex parte* Jones, 17 Vesey, 332; *Ex parte* Henson, 1 Maddock, 112; *Ex parte* Gwynn, 2 Dea. & Ch. 12; Kent *v.* Phelps, 2 Day, 483; Hall *v.* Daggett, 6 Cow. 657; Nourse *v.* Prime, 7 Johns. Ch. 79; Trotter *v.* Curtis, 19 Johns. 160; Suydam *v.* Westfall, 4 Hill, 211; Suydam *v.* Bartle, 10 Paige, 94; Bullock *v.* Boyd, Hoff. Ch. 294; Holford *v.* Blatchford, 2 Sand. Ch. 149; Seymour *v.* Marvin, 11 Barb. 80. But the amount so charged or taken must not exceed what is usually taken in the course of business; otherwise, the contract will be usurious. Kent *v.* Phelps, 2 Day, 483; Bartlett *v.* Williams, 1 Pick. 294; Stevens *v.* Davis, 3 Met. 211; De Forest *v.* Strong, 8 Conn. 519.

[4] Brown *v.* Harrison, 17 Ala. 774. And see cases cited in the preceding note.

[5] Merritt *v.* Benton, 10 Wend. 116. In this case, A gave his promissory note to B, which included one per cent. above the legal rate of interest, as the difference of exchange between the place where B, the payee, resided, and the place where the note was payable; and it was held that this did not amount to usury. See, also, Marvine *v.* Hymers, 2 Kern. 223; Leavitt *v.* De Launy, 4 Comst. 364; Commercial Bank *v.* Nolan, 7 How. (Miss.) 508; Andrews *v.* Pond, 13 Pet. 65; Buckingham *v.* McLean, 13 How. 151; Merritt *v.* Benson, 10 Wend. 116; Williams *v.* Hance, 7 Paige, 581; Ontario Bank *v.* Schermerhorn, 10 Paige, 109; Cayuga County Bank *v.* Hunt, 2 Hill, 635; Holford *v.* Blatchford, 2 Sandf. Ch. 149.

[6] Cuyler *v.* Sandford, 13 Barb. 339.

those who use it, taking his share of the profits, and becoming liable for the losses, this is not usurious.[1]

So, if one enters into a partnership, and provides money for its business, and the other party is to bear all the losses, and also to pay the capitalist more than legal interest as his share of the profits, this is not usurious, because there is no loan, if there be in fact a partnership.[2] If, however, there be only a pretended partnership, in order to disguise the fact of the loan, this would be usurious, although very possibly the lender might, as to a third party, lay himself open to a liability for debts incurred, by reason of his interest in the profits.[3]

The banks always get more than legal interest by their way of discounting notes and deducting the whole interest from the amount they give. This is perfectly obvious if we take an extreme case; as if a bank discounted a note of a thousand dollars at ten years, in Massachusetts, the borrower would receive four hundred dollars, and, at the end of ten years, he would pay back the four hundred dollars, and six hundred dollars for the use of it. But this method is now established by usage and sanctioned by law.[4]

[1] Fereday *v.* Hordern, 1 Jac. 144; Morisset *v.* King, 2 Burr. 891.

[2] Gilpin *v.* Enderby, 1 D. & Ry. 570. In this case, A, being established in trade, and wishing to increase his capital, entered into a deed of copartnership for ten years, with B, who advanced £20,000, upon a covenant that he should receive £2,000 a year during the partnership, out of the profits, if there were any, and if none, out of the capital; that he should not be answerable for any of the losses or expenses incident to the concern, and that the business should be carried on in the name of A only; that, at the end of the ten years, if the partnership determined by efflux of time, he should be repaid the £20,000, by instalments, at three months' date, bearing legal interest; and that, if default should be made in the annual payment of £2,000, or the joint capital should be at any time reduced to £20,000, then he should be at liberty to terminate the partnership, and repay himself the £20,000 advanced, immediately. *Held*, that, upon the face of the deed, A and B were partners, and that there was no loan of money within the meaning of the statute of usury. And see Fereday *v.* Hordern, *supra*.

[3] Huston *v.* Moorhead, 7 Penn. St. 45; Morse *v.* Wilson, 4 T. R. 353.

[4] In Thornton *v.* Bank of Washington, 3 Pet. 36, Mr. Justice *Story* says: "The defence set up against this action by the defendant is, that the transaction is usurious within the meaning of the statute of Maryland against usury, which (it is admitted) is substantially like the English statute upon the same subject. To sustain the defence, it has been urged that the receipts of the interest in advance for sixty-four days, upon the discount of the note, is usury. But we are all of opinion that the taking of interest in advance upon the discount of notes, in the usual course of business, by a bank, is not usury. The doctrine has been long settled, and is not now open for controversy." The following cases hold the same: Hoyt *v.* Bridgewater Co. 2 Halst. Ch. 253, 625; Manhattan Co. *v.* Osgood, 15 Johns. 162; Duncan *v.* The Maryland Savings Institution, 10 G. & J. 311; Bank of Utica *v.* Phillips, 3 Wend. 408; Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652; Bank of Utica *v.* Wager, 2 Cow. 712; Marvine *v.* Hymers, 2 Kern. 223; Stribbling *v.* Bank of the Valley, 5 Rand. 132; Sessions *v.* Richmond, 1 R. I. 298; Haas *v.* Flint, 8 Blackf. 67; State Bank *v.* Hunter, 1 Dev. 100; Ticorno

SECTION IV.

OF THE SALE OF NOTES.

There are, perhaps, no questions in relation to interest and usury, of more importance than those which arise from the sale of notes or other securities. In the first place, there is no doubt whatever that the owner of a note has as good a right to sell it for the most he can get, as he would have to sell any goods or wares which he owned. There is here no question of usury, because there is no loan of money, nor forbearance of debt. But, on the other hand, it is quite as certain that no one has a right to make his own note, and sell that for what he can get; for this, while in appearance the sale of a note, is in fact the giving of a note for money. It is a loan and a borrowing, and nothing else. And if the apparent sale be for such a price that the seller pays more than legal interest, or, in other words, if the note bear interest and is sold for less than its face, or is not on interest, and more than interest is discounted, it is a usurious transaction. Supposing these two rules to be settled, the question in each case is, under which of them does it come, or to which of them does it draw nearest.

We are not aware of any general principle, so likely to be of use in determining these questions, as this; if the seller of a note acquired it by purchase, or if it is his for money advanced or lent by him to its full amount, he may sell it for what he can get; but if he be the maker of the note or the agent of the maker, and receives for the note less than its face after a lawful discount, it is a usurious loan. In other words, the first holder of a note (and the maker of a note is not, and cannot be, its first holder) must pay the face of the note, or its full amount. And after paying this, he may sell it, and any subsequent purchaser may

Bank *v.* Johnson, 31 Maine, 414; Cole *v.* Lockhart, 2 Cart. (Ind.) 631; McGill *v.* Ware, 4 Scam. 21. See, also, Fleckner *v.* United States Bank, 8 Wheat. 354; Maine Bank *v.* Butts, 9 Mass. 49; N. Y. Fireman's Ins. Co. *v.* Ely, 2 Cow. 703. But this practice is strictly confined to negotiable paper, having a short time to run. Mowry *v.* Bishop, 5 Paige, 98; per *Sutherland*, J., in N. Y. Fireman's Ins. Co. *v.* Ely, *supra*; Eaton *v.* Bell, 5 B. & Ald. 40; Caliot *v.* Walker, 2 Anstruther, 496. And see Barnes *v.* Worlich, Cro. Jac. 25; Grysill *v.* Whichcott, Cro. Car. 283.

sell it, as merchandise.[1] The same rule (if it be law, of which we cannot doubt,) must apply to corporations and all other bodies or persons who issue their notes or bonds on interest.[2] If sold by brokers for them, for less than the full amount, it is usurious. Nor can such notes come into the market free from the taint and the defence of usury, unless the first party who holds them, pays for them their full value.

But then comes another question. If a note be offered for sale, and be sold for less than its face, and the purchaser supposes himself to buy it from an actual holder and not from the maker, can the maker interpose the defence that it was actually usurious, on the ground that the seller was only his agent. We should say that he could not; that there can be no usury unless this is intended; and that the guilty intention of one party cannot affect another party who was innocent. Undoubtedly, a note, originally usurious, is not healed, so far as the owner is concerned, by transfer to an innocent holder. The indorsers may be liable to the holder; but, whatever defence the maker could have, on the ground of usury, against the first holder, he may always have against any subsequent holder. This is because there was actual usury at the beginning; that is, one lent and the other borrowed, both knowing that more than legal interest was paid. But in the case of an innocent purchaser, or, rather, of one who supposes, and has a right to suppose, that he is a purchaser, he did not lend his money at all; he only bought a security with it; and, therefore, there is no usury.[3]

We should, however, say that, when a maker shows, that the apparent seller was only his agent, as evidence, that the note passed from him usuriously, he thereby casts upon the buyer

[1] The following cases will be found to uphold the principles laid down in the text. Lloyd *v.* Keach, 2 Conn. 179; Tuttle *v.* Clark, 4 Conn. 153; King *v.* Johnson, 3 McCord, 365; Musgrove *v.* Gibbs, 1 Dall. 217; Metcalf *v.* Pilcher, 6 B. Mon. 529; Wycoff *v.* Longhead, 2 Dall. 92; French *v.* Grindle, 15 Maine, 163; Farmer *v.* Sewall, 16 Maine, 456; Lane *v.* Steward, 20 Maine, 98; Hansbrough *v.* Baylor, 2 Munf. 36; Shackleford *v.* Morriss, 1 J. J. Marsh. 497; Oldham *v.* Turner, 3 B. Mon. 67; Churchill *v.* Suter, 4 Mass. 162; Ingalls *v.* Lee, 9 Barb. 647; Nichols *v.* Fearson, 7 Pet. 107; Moncure *v.* Dermott, 13 Pet. 345; Powell *v.* Waters, 8 Cow. 685; Rice *v.* Mather, 3 Wend. 65; Cram *v.* Hendricks, 7 Wend. 569; Rapelye *v.* Anderson, 4 Hill, 472; Holmes *v.* Williams, 10 Paige, 326; Holford *v.* Blatchford, 2 Sandf. Ch. 149.

[2] Saltmarsh *v.* Planters' and Merchants' Bank, 17 Ala. 768; Munn *v.* Commission Co. 15 Johns. 55.

[3] Whitworth *v.* Adams, 5 Rand. 333; Law *v.* Sutherland, 5 Gratton, 357; Shackleford *v.* Morriss, 1 J. J. Marshall, 497; Hansbrough *v.* Baylor, 2 Munf. 36; Holmes *v.* Williams, 10 Paige, 326.

the burden of proving his innocence, or, in other words, his belief that he was only a purchaser.

As one may sell the notes or other securities which he holds as property, under no other restriction than that which attends the sale of merchandise, so we think that a man may sell his credit. The cases which relate to this question, are far from harmonious. In the dread of usury, which was formerly entertained, and the determination — so strongly expressed by Mansfield — that it should not, by any device, escape the law, it has undoubtedly been held that the indorser of a note should be liable upon it only for what he received with lawful interest.[1] But, although we have not much positive authority for setting this rule aside, we are quite confident that a better understanding of the nature of negotiable paper, of the contract of indorsement, and, perhaps, of the rules which properly belong to the sale and purchase of money, would lead the courts to a different conclusion.

If A holds the note of B, and sells it to C, without indorsing it, he can certainly sell it for what he pleases; if he chooses to add his indorsement, he will do so, and he will probably do this if the additional value which he thus imparts to it, exceeds the risk he incurs. If, then, he indorses the note, it is to make his merchandise more valuable; and it would seem to be little less than an absurdity to say, that a merchant may not thus give a paper he holds more value, or that he may give the paper this value, but must not realize this value by the sale. If, however, the rule is, that, when called upon by the indorsee, he may plead usury as between them, and pay either nothing, or so much only as he received, without regard to the amount he agreed by his indorsement to pay, it is obvious that the whole effect and utility of the indorsement would be very much impaired. We think that a seller with indorsement should be, and that he now generally would be, held as liable for the full amount of the note; at least where the question is still an open one.

[1] Lane *v.* Steward, 20 Maine, 98; May *v.* Campbell, 7 Humph. 450; French *v.* Grindle, 15 Maine, 163; Metcalf *v.* Pilcher, 6 B. Mon. 530; Cram *v.* Hendricks, 7 Wend. 569; Rapelye *v.* Anderson, 4 Hill. 472; Ingalls *v.* Lee, 9 Barb. 647; Brock *v.* Thompson, 1 Bailey, 322; Freeman *v.* Brittice, 2 Harrison, 191. And some of the cases even hold that, where the purchaser of the paper holds the person to whom the money is advanced, responsible for the payment of the debt, this, *per se*, renders the transaction usurious. M'Elwee *v.* Collins, 4 Dev. & B. 209; Ballinger *v.* Edwards, 4 Ire. Eq. 449; *Cowen*, J., in Rapelye *v.* Anderson, 4 Hill, 472.

We should apply the same reasoning to the case of one who, having no interest in a note, indorses or guarantees it for a certain premium; thus, not adding his credit to the value of his property and selling both together, as where he indorses a note which he holds himself, but selling his credit alone. This transaction we should not think usurious.[1] And if it was open to no other defence, as fraud, for example, and was in fact what it purported to be, and not a mere cover for a usurious loan, we know no good reason why such indorser or guarantor should not be held liable to the full amount of his promise.

SECTION V.

OF COMPOUND INTEREST.

Compound interest is sometimes said to be usurious; but it is not so; and even those cases which speak of it as "savoring of usury," may be thought to go too far, unless every hard bargain for money is usurious. As the authorities now stand, however, a contract or promise to pay money with compound interest, cannot, generally, be enforced.[2] On the other hand, it is neither wholly void, nor attended with any penalty, as it would be if usurious; but is valid for the principal and legal interest only.[3]

[1] Thus, where A, being desirous of raising money upon a note, drawn by himself, and indorsed for his accommodation by B and C, authorized a broker to buy an additional name or guaranty, for the purpose of getting the note discounted, and application was accordingly made to D, who thereupon indorsed the note, receiving a commission of two and one half or three per cent. therefor; it was *held* that the taking of the commission by D, did not render the transaction usurious. Ketchum *v.* Barber, 4 Hill, 224. See, also, More *v.* Howland, 4 Denio, 264; Dry Dock Bank *v.* Am. Life Ins. and Trust Co. 3 Comst. 344; Dunham *v.* Gould, 16 Johns. 367. The earlier cases, however, seem to have held that the compensation thus received must not exceed the lawful rate of interest for the time the paper has to run. Bullock *v.* Boyd, Hoff. Ch. 294; Dey *v.* Dunham, 2 Johns. Ch. 182; Fanning *v.* Dunham, 5 Johns. Ch. 122; Moore *v.* Vance, 3 Dana, 361.

[2] As early as the case of Davis *v.* Higford, 1 Ch. Rep. 28, the court laid down the rule that interest upon interest could not be allowed. And in Waring *v.* Cunliffe, 1 Ves. Jr. 99, Lord *Thurlow* said that he had found the court in the constant habit of thinking compound interest not allowable, and that he must overturn all the proceedings of the court if he gave it. And see, to the same effect, Connecticut *v.* Jackson, 1 Johns. Ch. 13; Lord Ossulston *v.* Lord Yarmouth, 2 Salk. 449; Mowry *v.* Bishop, 5 Paige, 98; Hastings *v.* Wiswall, 8 Mass. 455; Ferry *v.* Ferry, 2 Cush. 92; Doe *v.* Warren, 7 Greenl. 48; Rodes *v.* Blythe, 2 B. Mon. 336; Childers *v.* Deane, 4 Rand. 406; *contrà*, Pawling *v.* Pawling, 4 Yeates, 220. But in the following cases it was held that an express contract to pay interest upon interest, is valid and enforceable. Peirce *v.* Rowe, 1 N. H. 179; Doig *v.* Barkley, 3 Rich. 125; Kennon *v.* Dickens, 1 Taylor, 231; Gibbs *v.* Chisolm, 2 Nott & McCord, 38; Singleton *v.* Lewis, 2 Hill, (S. C.) 408.

[3] Kellogg *v.* Hickok, 1 Wend. 521; Otis *v.* Lindsey, 1 Fairf. 316; Wilcox *v.* Howland, 23 Pick. 169.

Nevertheless, compound interest is sometimes recognized as due by courts of law, as well as of equity; and sometimes, too, by its own name. Thus, if a trustee be proved to have had the money of his *cestui que trust* for a long time, without accounting for it, he may be charged with the whole amount, reckoned at compound interest, so as to cover his unlawful profits.[1] If compound interest has accrued under a bargain for it, and been actually paid, it cannot be recovered back, as money usuriously paid may be.[2] And if accounts are agreed to be settled by annual rests, which is in fact compound interest, or are actually settled so in good faith, the law sanctions this.[3] Sometimes, in cases of disputed accounts, the courts direct this method of settlement.

Where money due on interest, has been paid by sundry instalments, the mode of adjusting the amount, which has the best authority and the prevailing usage in its favor, seems to be this: Compute the interest due on the principal sum to the time when a payment, either alone or in conjunction with preceding payments with interest cast on them, shall equal or exceed the interest due on the principal. Deduct this sum, and upon the balance cast interest as before, until a payment or payments equal the interest due; then deduct again, and so on.[4]

[1] Thus, where a trustee, under a marriage settlement, allowed the sum of £350 to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, he was held to account for the principal sum, with compound interest. Jones *v.* Foxall, 13 Eng. Law and Eq. 140. And see Evertson *v.* Tappen, 5 Johns. Ch. 497; Shieffelin *v.* Stewart, 1 Johns. Ch. 620. And see 1 Parsons on Contracts, 103, (b.)

[2] Mowry *v.* Bishop, 5 Paige, 98; Dow *v.* Drew, 3 N. H. 40.

[3] Stoughton *v.* Lynch, 2 Johns. Ch. 210; Bruce *v.* Hunter, 3 Camp. 467; Ossulston *v.* Yarmouth, 2 Salk. 449; Childers *v.* Deane, 4 Rand. 406; Tarleton *v.* Backhouse, Cooper's Ch. 231; Fobes *v.* Cantfield, 3 Ham. 18. But this is only allowed under a specific agreement, and after the mutual dealings of the parties have ceased. Von Hemert *v.* Porter, 11 Metc. 210; Denniston *v.* Imbrie, 3 Wash. C. C. 396.

[4] See Connecticut *v.* Jackson, 1 Johns. Ch. 13; Story *v.* Livingston, 13 Pet. 371; Jones *v.* Ward, 10 Yerger, 170; Smith *v.* Shaw, 2 Wash. C. C. 167.

CHAPTER XV.

OF BANKRUPTCY AND INSOLVENCY.

SECTION I.

OF THE HISTORY OF THE LAW OF BANKRUPTCY.

Centuries ago, dealers in money, or "exchangers," as they were called in England, sat behind a bench, on which lay heaps of the coin they bought or sold; and some remains of this practice may now be seen in various parts of the old continent. This bench, or "banco," in the Italian language, gave its name to the moneyed institutions of deposit, or of currency, of which the earliest of great importance, if not the first in time, was the "Bank" of Venice. When such a trader became insolvent, or unable to meet his engagements, those who had charge of such things, whether as a police or as an association or guild of such dealers, broke his bench to pieces, as a symbol that he could carry on that business no longer. In Italian, the words "banco rotto" mean a broken bench; and from this phrase grew the word "bankrupt." There are some however who deny any such practice as that of actually breaking a bench, but consider the phrase as merely figurative of insolvency.

In this we see nothing of alleged criminality, or of punishment. But the laws of England went to an earlier source than the Italian commerce of the middle ages, and found in the Roman law, the principle which governed, and perhaps still governs, their system of bankrupt laws. This principle is, that the bankrupt may be presumed to be dishonest and criminal, and treated accordingly.

By the English common law, the body of a freeman could not be arrested for debt, whether he was a trader or not. And the earliest processes of that law included none for imprisonment for debt. This was of later origin. In the reign of Edward I.

a law was passed authorizing an arrest of a defendant in certain cases, for the purpose of more effectually securing the performance of commercial contracts. This was extended in its operation by a law of Edward III. and sundry statutes followed, applying further regulations to this subject, until late in the reign of Henry VIII., (1544,) a statute was passed so nearly resembling a modern statute of bankruptcy, that it is generally considered the first bankrupt law. In a statute of the 13 Elizabeth, the operation of the law was confined to traders; or, in the words of the law, "to such persons as had used the trade of merchandise in gross or in retail." And thus an important principle was introduced which has since been constantly adhered to, although somewhat liberally construed.

In those, and in still earlier days, there was perhaps more reason for regarding a mercantile bankrupt as a criminal than there is now. Even at present, many insolvencies are undoubtedly fraudulent, and the innocent bankrupt generally, if not always, owes his failure to guilty intent or guilty imprudence in some quarter. But it is also certain that in the vast complications of the commercial world, all who engage in business are subject to casualties which imply no crime, and which no sagacity could avert. If the Roman law — that the merchant who failed in business should be expelled from the college (or guild) of merchants and never suffered to trade again, — if that law prevailed here, many of our most eminent and useful merchants would have lost the opportunity of retrieving their affairs by ultimate success, and paying off, by the fruits of a later industry, the debts of an earlier insolvency.

The community are now sensible of this. And to this connection we owe the gradual, but of late years, rapid, change in the spirit of our laws for the collection of debt. Now the endeavor is carefully to discriminate between an innocent and a wrongful insolvency; and to treat the latter only as criminal. That our laws do not yet effect this purpose perfectly, and without any injurious result, may be true; but the purpose and the principle are certainly right.

The Constitution of the United States authorizes congress to pass a bankrupt law. But not until eleven years after the adoption of the constitution, was a bankrupt law passed in 1800,

which, by its own terms, was limited to five years, but was in fact repealed after it had been in operation two years and eight months. Sundry attempts were made from time to time for a new one; and whenever the vicissitudes of trade pressed more heavily than usual on the community, these efforts were more urgent. And to the general dulness in the country, or rather the wide prevalance of actual insolvency, was due the law which was passed in 1841, after an earnest but unsuccessful endeavor in the year previous.

If the amount or number of applications for the law is a true measure of its need or its utility, this law was not passed too soon. In Massachusetts, for example, there were 3,389 applicants for relief, and the creditors numbered 99,619, more than a third of the adult male population of the State, and the amount of their claims exceeded thirty millions of dollars, averaging about three hundred and fifty dollars to a creditor.

This law was repealed March 3, 1843, one year six months and fourteen days after it was enacted; and in this short period it affected more property, and gave rise to more numerous and more difficult questions, than any other law has ever done, in the same period. It was repealed because it had done its work. The people demanded it that it might settle claims and remove incumbrances and liens and sweep away an indebtedness that lay as an intolerable burden on the community. When it had done this, it began, or was thought to have begun, to favor the payment of debt by insolvency too much, and the people demanded its repeal.

We have no national bankrupt law now. We shall probably never have one until another similar national emergency shall arise; and perhaps not then, because the state insolvent laws are now so well constructed and systematized, that they effect, though not quite so well, nearly all the purposes of a national law.

But these state laws are entirely independent of each other; and their provisions are so different, that it is difficult, or indeed impossible, to present a view of the bankrupt law of the United States, which can have the unity and system of such a view of the laws of any one nation, as of England for example. But there is enough of system and of similarity, and enough of principle running through the whole, to make it expedient to

endeavor to present a general view of the generally admitted principles, leaving local details and peculiarities, for the most part, to be learned elsewhere.

SECTION II.

OF THE DIFFERENCE BETWEEN BANKRUPTCY AND INSOLVENCY.

This difference was not perhaps perfectly clear in its beginning, and has gradually grown dim with time, until now, in this country at least, it has become almost obliterated. But from it arose, and upon it, in some measure, depends, our present American law of insolvency.

The earliest difference between these was perhaps, that insolvent laws applied not only to traders, but to all who were indebted and unable to pay their debts. The more prominent distinction, however, was this, that the process under the bankrupt law was *in invitum against* the bankrupt, by his creditors, in order to obtain a sequestration of his effects, and prevent a further waste, or fraudulent or unequal misapplication of them, and secure the payment of their debts as far as these effects would go. But the insolvent laws were intended for the relief of debtors who sought to be protected by the delivery of all their property, from further molestation. This distinction is now so far lost sight of, that the last national bankrupt law, and most of the state insolvent laws, provide separately for a process *in invitum*, and also for one on the application and request of the insolvent. It has also been supposed that another ground of distinction lay in the fact that the bankrupt law discharged the debt, while the insolvent law left the debt in full force, but protected the debtor himself from arrest or imprisonment. But this distinction has also faded away.

For a long time, in England, these two systems of law — Bankruptcy Statutes and Insolvency Statutes — ran along together, those of Insolvency being the more numerous, but the two subjects were kept quite apart. At length, they began to assimilate, and in the recent legislation, especially by the 7 & 8 Vict. c. 96, they have continued to approach nearer and nearer

together, until there is now scarcely any discrimination between them.[1]

In this country, there has not been any very clear distinction between them, at any time; but one consequence from the nominal distinction was important. These colonies, from the earliest times, enacted insolvent laws, but not bankrupt laws. And when the Constitution of the United States gave to congress the power to pass a bankrupt law, it seems to have been thought that this in no wise affected the rights which the States continued to possess, of enacting what insolvent laws they chose to. This right they have continued to exercise to the present day; and always under the name of insolvent laws. But, so far as we may affirm with much positiveness any conclusions on this obscure subject, we may say that the distinction between insolvent laws and bankrupt laws is now, in this respect at least, nothing, and that a State can pass no law by calling it an insolvent law, which it could not pass under the name of a bankrupt law; and that the power given to congress, to pass a bankrupt law, does not take it away from the States, who may pass what bankrupt laws they will for their own citizens, whenever there is no general bankrupt law enacted by congress.[2] And even if

[1] 1 Spence's Equitable Jurisdiction of the Court of Chancery, 202; Stat. 5 & 6 Vict. c. 70.

[2] 13 Mass. 1, Bradford *v.* Russell. The doctrine of the text is admirably stated by *Marshall*, C. J., in the leading case of Sturges *v.* Crowninshield, 4 Wheat. 191. "The subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. But if an act of congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity." . . . . . "This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion, that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of a grant to congress. It may be thought more convenient that much of it should be regulated by state legislation, and congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bank-

there be such a law, any State may, perhaps, pass any bankrupt law which in no way interferes with or contravenes the statute of the United States. This last remark, even if admitted to be true, cannot have much practical value, for it can hardly be supposed that congress will pass any general bankrupt law which would be so inadequate or incomplete that a State could pass an insolvent law of any importance, which should not interfere with it. Where cases had been begun under the state insolvency laws, before the bankrupt law went into force, it was decided that they might go on to maturity, and were not superseded by this national law.[1]

At present, we have no general bankrupt law, but a great variety of state insolvent laws. Of their special provisions, we do not propose to speak; but shall confine our remarks, principally at least, to those general principles which may be supposed common to them all, where not specifically excluded. And of these, what may be called the fundamental principle, is an equal division of the assets of an insolvent among his creditors.

At common law, any person, whether a trader or otherwise, may pay any debt at his own pleasure, whether he be insolvent

ruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States. It has been said, that congress has exercised this power; and, by doing so, has extinguished the power of the States, which cannot be revived by repealing the law of congress. We do not think so. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States; but it removes a disability to its exercise, which was created by the act of congress." And see Story on the Constitution, 11; Ogden *v.* Saunders, 12 Wheat. 213; 2 Kent, 394, and note.

[1] *Ex parte* Eames, 2 Story, 322, and 5 Law Rep. 325, S. C.; 5 Law Rep. 360. Judd *v.* Ives, 4 Met. 401. In this case, the rule was stated with the limitation only that the bankrupt law did not suspend the operation of the insolvent law in cases where the proceedings under the state law had been commenced previously to the existence and operation of the bankrupt law. And the same limitation is sustained in the cases above cited, and in Griswold *v.* Pratt, 9 Met. 16. But in Ziegenfuss' case, 2 Ired. 463, it was held, in the opinion delivered by Mr. Justice Battle, and concurred in by the full bench of the Supreme Court of North Carolina, that a state insolvent law may exist and operate with full vigor until the bankrupt law attaches itself upon the person or property of the debtor by proceedings instituted in bankruptcy; and it was further held that no case of conflict could arise until after the proceedings in bankruptcy had reached that stage in which the debtor had been judicially declared a bankrupt. The doctrine of the court is maintained with great ability, and the objections to it are met and answered. Yet it has not met with subsequent favor, and it is certainly opposed to the contemporaneous authorities, and is the only case we have met with where the view is adopted. See, as sustaining the doctrine of the cases above cited, a case in the District Court of New York, reported 1 New York Legal Observer, 211.

or not; and if such payment exhaust his means, so that he can pay no other creditor, the common law makes no objection. In other words, it permits a preference among creditors, to any extent and in any form. Nor does the statute of fraudulent conveyance affect this question, because, although no debtor may "hinder, delay, or defraud a creditor," it is not considered that he does this by paying one more than another, or paying to some of his creditors all their debts, and to others nothing, provided his reason for paying them nothing is, that he had nothing left for them.

At this right of preference, the bankrupt system was directly aimed. Since the reign of Elizabeth, it has been restrained and almost suppressed in England. But in this country, where, as has been said, the English bankruptcy system was never introduced, and this whole matter was regulated by common law, a system of voluntary assignment, with preferences of all kinds, prevailed extensively. The frauds and mischiefs resulting from this, gradually produced a conviction that both expediency and justice imperatively demanded an equal distribution of the assets of an insolvent among all his creditors. In Maine, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Pennsylvania, Ohio, Missouri, Georgia, and Louisiana, special assignments, with preferences, are no longer permitted.[1] In other

[1] Buffum *v.* Green, 5 N. H. 79. *Richardson*, C. J.: "It is very clear that an insolvent debtor may give a preference to one creditor by paying his debt in full, to the exclusion of all the rest of the creditors, provided it be done in good faith." Stevens *v.* Bell, 6 Mass. 342. *Parsons*, C. J.: "At common law, every man might prefer any creditor, and might pledge his property and convey it in trust, so that no fraud resulted to others; and if he stripped himself of all his property in favor of any one creditor, leaving himself quite destitute, no other creditor had legal cause of complaint, if the transaction was honest and for a valuable consideration. This right in a debtor is founded on the acknowledged principle that he may prefer or secure any one creditor, in a way that is not a fraud on another." And to the same point, Tompkins *v.* Wheeler, 16 Pet. 106; Twyne's case, 3 Co. 80; Marbury *v.* Brooks, 7 Wheat. 556; Estwick *v.* Caillaud, 5 T. R. 420; Brooks *v.* Marbury, 11 Wheat. 78; Cadogan *v.* Kennet, Cowp. 432; Hull *v.* Jeffrey, 8 Ham. (Ohio R.) 390; M'Cullough *v.* Sommerville, 8 Leigh, 415; Ex'or of Skipwith *v.* Cunningham, 8 id. 271; Hickley *v.* Farmers' and Merchants' Bank, 5 Gill & J. 377; Crawfords *v.* Taylor, 6 id. 323; McMenomy *v.* Roosevelt, 3 Johns. Ch. 446; Bell *v.* Thompson, 3 Mis. 84; Pearson *v.* Rockhill, 4 Ben. Mon. 296. In New York, it seemed, for some time, to be doubted whether the right of preference of creditors was maintainable at the common law, and the expediency of allowing it was greatly doubted. In Riggs *v.* Murray, 2 Johns. Ch. 577, it is said, by Chancellor *Kent:* "As we have no bankrupt system, the right of the insolvent to select one creditor and to exclude another, is applied to every case, and the consequences of such partial payments are extensively felt, and deeply deplored. Creditors out of view, and who reside abroad or at a distance, are usually neglected. This checks confidence in dealing, and hurts the credit and character of the country. These partial assignments are, no doubt, founded, in certain cases, upon meritorious considerations, yet, the temp-

States, particularly in New York, there seems to be a growing disposition to encourage an equal division, by providing not only, as is now generally done, that the insolvent shall be discharged only when his effects are equally divided, but that all preferences shall be void. This system is found to operate so well wherever it is tried, we cannot doubt that it will be, at no distant day, universal. We are not aware that any State which has suppressed

tation leads strongly to abuse, and to the indulgence of improper motives. The Master of the Rolls, in Small *v.* Oudley, 2 P. Wms. 427, and the Lord Chancellor, in Cock *v.* Goodfellow, 10 Mod. 489, admit that such preferences, by a sinking debtor, may, and in certain cases ought to be given, and are called for by gratitude and benevolence; yet, at the same time it is acknowledged that the power may be abused, and be rendered subservient to fraud. Experience shows that preference is sometimes given to the very creditor who is the least entitled to it, because he lent to the debtor a delusive credit, and that, too, no doubt, under assurances or a well-grounded confidence of priority of payment, and perfect indemnity, in case of failure. How often has it happened that the creditor is secured who was the means of decoying others, while the real business creditor, who parted with his property on liberal terms, and in manly confidence, is made the victim. Perhaps some influential creditor is placed upon the *privileged* list, to prevent disturbance, while those who are poor, or are minors, or are absent, or want the means or the spirit to engage in litigation, are abandoned." Whether an assignment for the benefit of such creditors, as should sign a release to all claims against the debtor, was good at common law, has been the subject of much judicial controversy. In Riggs *v.* Murray, 2 Johns. Ch. 565, it was held that a reservation of a similar nature rendered the assignment fraudulent and void. In this case, the assignment was of all the property of the debtor in trust, to pay the trustees and such other creditors as the debtor in one year, by deed, might direct and appoint, &c., reserving a power to appoint new trustees, and to revoke, alter, add to, or vary the trusts, at his pleasure, is void. This judgment was reversed in error, 15 Johns. 571; and the cases are reviewed at length by Mr. Chief Justice Thompson. But in Grover *v.* Wakeman, 11 Wend. 187, the doctrine of 15 Johns. 571, was denied; and it was held that a provision making the preference depend upon the execution by the preferred creditors of a release to the debtor of all claims against him, is void. And the doctrine is laid down, which seems to be the law at this day when preferences are allowed, that an assignment, to be valid, must be absolute and unconditional, and must contain no reservation or condition for the benefit of the debtor, and that it must not extort from the fears or apprehensions of the creditors an absolute discharge as a consideration for a partial dividend. An assignment containing a stipulation for a release, was sustained in Lippincott *v.* Barker, 2 Binn. 174, and by Washington, J., in Pearpoint *v.* Graham, 4 Wash. C. C. Rep. 232. In Ingraham *v.* Wheeler, 6 Conn. 277, such a provision was held to invalidate an assignment. And the same point was decided in Atkinson *v.* Jordan, 5 Hammond, 293. In Halsey *v.* Whitman, 4 Mason, 230, *Story*, J., though admitting the weight of authority to be, on the whole, in favor of the validity of such a clause in an assignment, declared that, if the question were entirely new, and many estates had not passed on the strength of such assignments, the strong inclination of his mind would be against their validity. The authorities are reviewed in the learned opinion of *Ware*, J., in the District Court of Maine, in Lord *v.* Brig Watchman, and the validity of an assignment with a clause providing for a release, is denied. 8 Am Jur. 284. The same doctrine is maintained in Ramsdell *v.* Sigerson, 2 Gilman, 78; Sheppards *v.* Turpin, 3 Gratt. 372; Stevenson *v.* Agry, 7 Hammond, pt. 2, 247. And in those States where an insolvent law is in force, and assignments with preferences are not forbidden, such assignments must conform to the provisions of the Insolvent Act, and a conflict vitiates the assignment. Repplier *v.* Orrich, 7 Hammond, pt. 2, 246; Hickley *v.* Farmers' and Merchants' Bank, 5 Gill & J. 377; Harshman *v.* Lowe, 9 Hammond, 92. But in later decisions, and previous to the enactment of the provisions mentioned in the text, the right was fully vindicated. See Murray *v.* Riggs, 15 Johns. 571; Grover *v.* Wakeman, 11 Wend. 187.

special assignments with preferences, has ever returned to them.[1]

SECTION III.

OF THE TRIBUNAL AND JURISDICTION.

The bankrupt law of the United States gave the jurisdiction of all cases to the District Court; and the reasons for this are so obvious, that it would undoubtedly be so provided in every future law. The state insolvent laws, for the most part, provide commissioners of insolvency, and among these the judges of probate are sometimes placed *ex officio;* but there is no uniformity on this point. There is, certainly in general, and we think always, a supervisor power in the Supreme Court, or in the Court of Chancery.

If a creditor's claim be doubted, the assignees may have the question decided by a jury; and so may the creditor, if his claim be disallowed; by the provisions of many States.[2]

As to the manner of initiating the proceedings in bankruptcy, the national law contained some provisions, copied substantially from the English laws; and in the short time during which the law was in force, various rules were made by the courts, or resulted from adjudication. At present, each board of commissioners, or each commissioner, seems to have the power of framing their own rules of practice, always, however, subordinate to the principles, first, that each case shall begin with an application, either from the creditor (where that is permitted) or the debtor, under oath, and then full notice, by advertisement or

[1] N. H. Rev. Stat. c. 134; Beard *v.* Kimball, 11 N. H. 471; Mass. Rev. Stat. c. 238, § 3; Mann *v.* Huston, 1 Gray, 250; Conn. Stat. of 1828; Bates *v.* Coe, 10 Conn. 280; Laws of Penn., ed. of 1847, c. 592. No preference among creditors allowed, except for wages of labor, provided that the claims of laborers thus preferred shall not severally exceed the sum of fifty dollars. Rev. Stat. of New Jersey, tit. 9, c. 1, § 1. All preferences of one creditor over another, or whereby any one or more shall be first paid, or have a greater proportion in respect of his or their claim than another, shall be deemed fraudulent and void, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors. Ohio Rev. Stat. c. 57, (69,) § 1. So in Iowa. Code of Iowa, 1851, c. 62, § 977.

[2] And in like manner it was provided, by the 7th section of the U. S. Act, of 1841, that "as well the assignee as the creditor shall have a right to a trial by jury, upon an issue to be directed by such court to ascertain the validity of such debts or other claims.

otherwise, to all interested, with sufficient delay, and convenient arrangement as to time and place. And, secondly, all the facts material to any party, are to be proved before the proper tribunal, by proper evidence, verified by oath, and subject to cross-examination, and generally governed by the law of evidence.

There is also introduced into most of these codes a rule derived from equity practice, by which the debtor may be compelled to answer, under oath, upon the interrogatories put to him by the commissioners, or by one or more creditors; especially upon matters bearing on the question whether he has made any fraudulent or favoring assignments of property, with a view to bankruptcy, or while actually insolvent.[1] But the common-law privilege would in most cases still be allowed him, of refusing to answer any question, if the question could expose him to punishment for a crime.[2]

[1] It was provided, in the U. S. Bankrupt Act of 1841, that the bankrupt should be subject to examination under oath, "in all matters relating to such bankruptcy and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice." And in the Act 12 & 13 Vict. c. 106, §§ 117, 260, a similar provision occurs; and the bankrupt may be compelled, under pain of committal, to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination, so reduced into writing, the said bankrupt shall sign and subscribe. *Ex parte* Page, 1 B. & Ald. 568.

[2] Archbold on Bankruptcy, 277; *Ex parte* Cossens, Buck's Cases, 531. In the matter of Worrall. This rule may, however, require some qualification; for, in the case above cited, it is said, by Lord Chancellor *Eldon:* "I conceive that there is no doubt that it is one of the most sacred principles in the law of this country, that no man can be called on to criminate himself, if he chose to object to it; but I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though, in the course of giving information to his creditors or assignees of what his property consists, that information may tend to show he has property which he has not got, according to law; as in the case of smuggling, and the case of a clergyman carrying on a farm, which he could not do according to the act of parliament, except under the limitation of the late act; and the case of persons having the possession of gunpowder in unlicensed places, whereby they become liable to great penalties, whether the crown takes advantage of the forfeitures or not; in all these cases the parties are bound to tell their assignees, by the examination of the commissioners, what their property is, and where it is, in order that it may be laid hold of for the purposes of the creditors." And in 1 Rose's Cases in Bankruptcy, 407, in *Ex parte* Oliver, seven years before the case in Buck was decided, it was held, by Lord Eldon, that the court had power to punish a bankrupt for contempt, who refused to answer any questions regarding his estate, even though the answer would criminate himself. 2 Ves. & Beame, 244, S. C. In Pratt's case, 1 Glyn & J. 58, and Montague & Bligh, 203, the doctrine was broadly stated that the bankrupt was bound to disclose all circumstances respecting his property, be the consequences what they might. And see *Ex parte* Meymot, 1 Atk. 200; *Ex parte* Nowlan, 11 Ves. 514. But in *Ex parte* Kirby, 1 Mont. & McA. 229, Lord Lyndhurst was unwilling to admit that the commissioners could dispense with the general rule of law, that no person can be compelled to criminate himself. The rule, however, in view of later cases, which went to a great extent upon the opinion of Lord Eldon, above quoted, we think may be stated as follows: The bankrupt may be compelled to answer any question relating

The power to compel an answer is given to the commissioners, by authorizing them to issue a *capias*, and commit a recusant for contempt, as a common-law court could do.[1]

At common law, any kind or amount of preference of one or more creditors over others, was, as we have seen, valid. That is, the law required of a debtor to pay his debts; but permitted him to pay any debt at his own election, although by such an appropriation of his means, he could pay no part of any other.[2] As, however, the general purpose of the insolvent laws is to secure an equal division of all the assets among all the creditors, for this purpose they avoid any payment, assignment, or transfer which would have, or was intended to have, the effect of favoring a part of the creditors at the expense of the others.

There is, however, an obvious difficulty in applying this rule. If a trader, as is usually the case, passes gradually into a state of insolvency, almost any creditor, who has the good fortune to be paid in full, gains an advantage over the rest, and reduces the means of the insolvent to their injury. A line, however, must be drawn somewhere. If an assignment or appropriation of property be made with fraudulent intent at any time, and this fraud is known to the assignee,[3] the assignment itself is void at

to the disposition of his property, even though the answer may tend to criminate him. The principle of the rule is well illustrated in the case put by *Erskine*, C. J., in 2 Dea. & Chit. 214, *In re* Heath: "Now, with respect to the proposition put by Mr. Montague, I agree with him that you could not ask a man whether he had not robbed another of a sum of money; because, if he had so robbed, the money would not be the property of the assignees, but of the party robbed; it would be, in fact, no discovery of the estate of the bankrupt. But I can see no objection to this question, (unless it might be regarded as a chain in evidence, to convict the party of robbery,) namely: 'Had you not on such a day, and at such a place, £100?' And, according to the answer, you might then interrogate what he had done with it. In the present case, the question is, 'What have you done with this property,' not, 'How did you obtain it?' And I think all the cases have been decided in that way of looking at the question." And the same doctrine is maintained *In re* Smith, 2 Dea. & Chit. 230; *In re* Feaks, 2 ib. 226.

[1] Kimball *v.* Morris, 2 Met. 573, Archbold, 278.

[2] In relation to the matter of preference, see cases above cited, p. 276, n. 4.

[3] In Cook *v.* Caldecott, Moody & Malkin, 525, the law is clearly stated by Lord *Tenterden*, C. J.: "All other proof of any act of bankruptcy previous to the sales in question having failed, the only question is, whether the transactions in themselves, or either of them, are to be considered as acts of bankruptcy within the 6 G. 4, c. 16, s. 3. The words of the clause are 'fraudulent gift, delivery, or transfer,' the word 'fraudulent' of course applying to each of those which follow it. Now the sale is a 'transfer,' and therefore may come within the provisions of the statute as a 'fraudulent transfer.' But though it may do so, it is not, from its nature, a transaction exposed to the same suspicion as some of those which would be comprehended under the former words; and I think that a sale cannot in reason be held to be a fraudulent transfer, unless it takes place under such circumstances that the buyer, as a man of business and understanding, ought to suspect and believe that the seller means by it to get money for himself in fraud of his creditors, and that the sale is made for that purpose. The

common law. But, as was said, the mere intention of giving to a creditor priority or preference, is not fraudulent. And the national law contained, and most, if not all, our insolvent laws contain a provision defining a period of time *prior* to which an assignee of property from a bankrupt, unless there be a fraud at law on his part with the knowledge and connivance of the assignee, is valid; but any assignment or transfer or payment after it, if made by the bankrupt in contemplation of bankruptcy or insolvency, is void, however innocent or ignorant the assignee.[1] In the national law this was two months; it differs in the different States, but is about the same time generally.[2]

question, therefore, for the jury is, whether they think that the defendant, as a man of business, ought to have known that *Down* must have effected these sales, or either of them, for the purpose of putting the proceeds in his own pocket and defrauding his creditors? If so, the verdict should be for the plaintiffs, for all goods comprised in that transaction or delivered subsequently to it."

[1] The clause "in contemplation of bankruptcy" has received judicial construction in several cases. In Arnold *v.* Maynard, 2 Sto. 349, it was held by Judge Story that the claim does not necessarily mean in contemplation of his being declared a bankrupt within the statute, but in contemplation of his actually stopping his business, because of his insolvency and incapacity to carry it on. In this case, the English authorities are reviewed, and the conclusion reached is, that if when the party "is deeply involved in debt, and intending to fail and break up his whole business at once, he makes a conveyance to a particular creditor to give him a preference over all the rest, it seems to me irresistible evidence that he does the act in contemplation of bankruptcy. I do not think that it is necessary for this purpose that he should contemplate the conveyance as an act of bankruptcy, or that he should make it with a present and immediate intention to take the benefit of that statute. And in 8 Met. 385, Jones *v.* Howland, it was held that, though insolvency in fact exists, yet if the debtor honestly believes he shall be able to go on in his business, and with such belief pays a just debt, without design to give a preference, such payment is not fraudulent, though bankruptcy subsequently ensue. And the same doctrine was held in the District Court of Vermont by Prentiss, J., 6 Law Rep. 261, *In re* Pearce, and in Mitchell *v.* Gazzam, 12 Ohio, 325. But confession of a judgment is valid, in view of this provision, if it be not voluntary, but the effect of measures taken by the creditor, or in his power to take. Haldeman *v.* Michael, 6 Watts & S. 128, though the confession be but ten days before the filing of the petition. Taylor *v.* Whitthorn, 5 Humph. 340. And security given to a creditor in contemplation of bankruptcy, with a view to prefer, is not void, if the act be not strictly voluntary. Phœnix *v.* Assignees of Ingraham, 5 Johns. 412; M'Mechen's Lessee *v.* Grundy, 3 Harris & J. 185. As to the effect of a discharge obtained after such transfer, in contemplation of bankruptcy, see Brereton *v.* Hull, 1 Den. 75; Beekman *v.* Wilson, 9 Met. 434. The English cases on the construction of this clause are numerous. Wedge *v.* Newlyn, 4 B. & Ad. 831; Newton *v.* Chantler, 7 East, 138 *et seq.*; Pulling *v.* Tucker, 4 B. & Ald. 382; Fidgeon *v.* Sharpe, 5 Taunt. 539; Flook *v.* Jones, 4 Bing. 20; Poland *v.* Glyn, 4 Bing. 22, n.; Ridley *v.* Gyde, 9 Bing. 344; Morgan *v.* Brundrett, 5 B. & Ad. 289; Baxter *v.* Pritchard, 1 Ad. & Ell. 456; Abbott *v.* Burbage, 2 Bing. N. C. 444; Compton *v.* Bedford, 1 W. Bl. 362; Carr *v.* Burdiss, 1 C. M. & R. 447; Hartshorn *v.* Slodden, 2 B. & P. 582; Gibbins *v.* Phillips, 7 B. & C. 529; Atkinson *v.* Brindall, 2 Bing. N. C. 225; Belcher *v.* Prittie, 10 Bing. 408.

[2] The clause of the late national law was: "Provided that all dealings and transactions by and with any bankrupt *bonâ fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act." And a similar provision occurs in the English Bankrupt Law. 1 Moody *v.* Malkin, 141; Cowie *v.* Harris. In this case, the commission in bankruptcy was issued on the 14th of May, 1825. Goods of the bankrupt had been deposited with a pawn-

In computing this time, it is said that the day on which the transaction took place, or the day on which the petition is filed, must be excluded.[1] In legal computations of time, generally, the law knows no fractions of a day. But in the application of the insolvent laws, the very hour is inquired into. The reason of this, or at least its justice is obvious. If one's rights depend upon whether he has lain in prison two months, or whether a certain thing was done more or less than two months before another, or whether a petition was filed under a law before that law was repealed or not, it is as proper to ascertain the exact time, as it is when there is a question whether an attachment of land or a record of a conveyance was first made. This has been denied in some cases, but not, we think, on good grounds.[2]

It would seem that this question of fraudulent preference should stand upon the same footing as questions of fraud generally. It is a mixed question of fact and of law; and so far as it depends upon law, or upon construction, the court may decide it, and the parties have a right to have it decided by the court. But so far as it rests upon proof, or is to be inferred from evidence

broker on the 14th of March, 1825. The Attorney-General for the plaintiffs, did not contend that they were deposited within the two months, and Lord *Tenterden*, C. J., said: "With respect to the goods deposited on the 14th, the right of the plaintiffs will depend upon the validity of the transaction, as between the bankrupt and the creditor; for both days cannot be reckoned inclusively, so as to make March the 14th not more than two calendar months before May the 14th, the date of the commission." S. P. *Ex parte* Farquhar, 1 Mont. & McA. 7.

[1] Thomas, assignee of Houlbrooke *v.* Desanges, 2 B. & Ald. 586. In this case the facts were, that the bankrupt was surrendered in discharge of his bail, on June 1st, 1818, between six and eight o'clock in the evening, and on the same day between one and two o'clock in the afternoon, a writ of *fieri facias* was delivered to the defendants, who, by their officer, entered into the bankrupt's premises and seized the goods. The bankrupt lay in prison more than two months afterwards. The plaintiffs insisted that the act of bankruptcy having been committed on the same day that the goods were taken in execution, the plaintiffs must in law be considered as having the property of the goods vested in them during the whole of that day, because there can be no fraction of a day. *Abbott*, C. J., thought that the court might notice the fraction of a day in this case, and nonsuited the plaintiffs, and a rule to set aside the nonsuit was refused. In the matter of Richardson, 2 Story, 571, *Story*, J., said: "I am aware that it is often laid down that in law there is no fraction of a day. But this doctrine is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and therefore, like all other legal fictions, is never allowed to operate against the right and justice of the case. S. P. Sadler *v.* Leigh, 4 Camp. 195; *Ex parte* Farquhar, 1 Mont. & McA. 7; *Ex parte* D'Obree, 8 Ves. 82; Wydown's case, 14 Ves. 80. We are aware of no cases where the technical rule of the law that no fraction of a day can be allowed, has been adhered to in bankruptcy, save The matter of David Howes, 6 Law Reporter, 297; and In the matter of Wellman, 7 ib. 25, where the doctrine laid down in the first case is maintained and defended. The authorities are reviewed in the opinion of the court at some length, and the views of the judge, though savoring of technicality, are ably sustained.

[2] See cases cited in the preceding note.

direct or circumstantial, it would seem to be a question of fact, upon which a jury might pass.

It may be remarked in this connection, although true without any reference to the laws of bankruptcy or insolvency, that if one purchases of another property, either real or personal, for its full value, and pays the price in money, it is still a fraudulent transaction, provided the purchaser did it with intent to aid the seller in defrauding his creditors. And in this case the sale is wholly void, and the assignee of the seller, if he goes into bankruptcy, will recover the property, although the sale take place before the limited period above referred to.[1]

The very important influence of bankruptcy or insolvency in extending the lien of a seller, so that he may reclaim his goods, unless they have come into the actual possession of the insolvent, or, in other words, the right which insolvency gives to the seller, of stopping the goods in transitu, is fully considered in the chapter on Stoppage in Transitu. This right depends of course upon insolvency, but not necessarily upon legal and formal, or, as it is sometimes called, notorious insolvency.[2]

SECTION IV.

WHO MAY BE INSOLVENTS.

The statutes provide with much minuteness, as to who may become, or may be made bankrupt.[3] In England, the statute of

[1] Arnold *v.* Maynard, 2 Sto. 350; Fidgeon *v.* Sharpe, 5 Taunt. 539; Hassels *v.* Simpson, 1 Doug. 89; Worsley *v.* de Mattos, 1 Burr. 467; Newton *v.* Chantler, 7 E. 138; Chase *v.* Goble, 2 M. & Gr. 930; Carr *v.* Burdiss, 1 C. M. & R. 443; Siebert *v.* Spooner, 1 M. & W. 714; Cook *v.* Caldecott, 4 C. & P. 315; Baxter *v.* Pritchard, 1 Ad. & El. 456, 460; Graham *v.* Chapman, 11 E. L. & E. 498; Newnham *v.* Stevenson, 3 Eng. Law and Eq. 512; Butler *v.* Hildreth, 5 Met. 49.

[2] See the chapter on Stoppage in Transitu and cases cited there.

[3] Thus in the late National Bankrupt Law, provision was made for voluntary and involuntary bankrupts. In the first section of the act it was provided that: "All persons whatsoever, residing in any State, district, or territory of the United States, owing debts, which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian, or trustee, or while acting in any other judiciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief, a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights, and credits, of every name, kind, and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or if conscientiously scrupulous, of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to

Geo. III. c. 16, § 2, collects in one clause the various kinds of persons whom the bankrupt law considered as traders,[1] and some-

meet their debts and engagements, shall be deemed bankrupts within the provisions of this act, and may be so declared accordingly by a decree of such court; all persons being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person being a merchant, or being a retailer of merchandise, or actually using the trade of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, district, or territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested; or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, or sequestrated, or taken in execution; or shall remove his goods, chattels, and effects, or conceal them to prevent their being levied upon, or taken in execution, or by any other process; or make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, credits, or evidence of debt." And similar provisions occur in other statutes.

[1] In this note we give the enumeration which occurs in the English Statute of Consolidation of the Bankrupt Laws, 12 & 13 Vict. c. 106, § 65. We cite important cases upon the construction the courts have put upon several of their classes of traders. They will be mostly found collected in the notes of Chitty's Statutes of Practical Utility, but which may not be accessible to the general reader. "That all alum makers, apothecaries, auctioneers, bankers: *Ex parte* Wilson, 1 Atk. 218; *Ex parte* Wyndham, 1 M. D. & D. 146; *Ex parte* Hall, 3 Deac. 405; *Ex parte* Brundrett, 2 Deac. 219; *Ex parte* Brown, 2 M. D. & D. 752. Bleachers, brokers: Pott *v.* Turner, 6 Bing. 702; Highmore *v.* Molloy, 1 Atk. 206; Rawlinson *v.* Pearson, 5 B. & Ald. 124; *Ex parte* Stevens, 4 Madd. 256; *Ex parte* Phipps, 2 Deac. 487; *Ex parte* Harvey, 1 Deac. 570; 2 M. & Ayr. 593; Hankey *v.* Jones, Cowp. 745; *Ex parte* Gem, 2 M. D. & D. 99; *Ex parte* Moore, 2 Deac. 287. Brickmakers: Wells *v.* Parker, 1 T. R. 34; Sutton *v.* Weeley, 7 East, 442; *Ex parte* Harrison, 1 Bro. C. C. 173. Builders: *Ex parte* Neirinckx, 2 M. & Ayr. 384; *Ex parte* Edwards, 1 M. D. & D. 3; *Ex parte* Stewart, 18 L. J. Bankr. 14; Stuart *v.* Sloper, 3 Ex. 700. Calenderers, Carpenters: Cooke, B. L. 49; Chapman *v.* Lamphire, 3 Mod. 155; Kirney *v.* Smith, 1 Ld. Raym. 741. Carriers, cattle or sheep salesmen: *Ex parte* Newall, 3 Deac. 333. Coach proprietors: *Ex parte* Walker, 2 M. & Ayr. 267; Martin *v.* Nightingale, 11 Moo. 305. Cow-keepers: Carter *v.* Dean, 1 Swanst. 64; *Ex parte* Deering, De Gex, 398. Dyers, fullers, keepers of inns: Smith *v.* Scott, 9 Bing. 14; *Ex parte* Birch, 2 M. D. & D. 659; see also, *Ex parte* Willes, 2 Deac. 1; *Ex parte* Bowers, 2 Deac. 99; Gibson *v.* King, 10 M. & W. 667; King *v.* Simmonds, 12 Jur. 903; *Ex parte* Daniell, 7 Jur. 334. Taverns, hotels, or coffee-houses, lime-burners, livery stable keepers: *Ex parte* Lewis, 2 Dea. 318; Cannan *v.* Denew, 10 Bing. 292. Market gardeners: *Ex parte* Hammond, 1 De G. 93; also Carter *v.* Dean, 1 Swanst. 64. Millers, packers, printers, ship-owners: *Ex parte* Bowes, 4 Ves. 168; *Ex parte* Wiswould, Mont. 263. Shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of scrivener receiving other men's moneys or estates into their trust or custody: Adams *v.* Malkin, 3 Camp. 534; Let *v.* Melville, 3 Man. & G. 52; Hamson *v.* Harrison, 2 Esp. 555; *Re* Lewis, 2 Rose, 59; Hurd *v.* Brydges, 1 Holt, N. P. 654. *In re* Warren, 2 Sch. & Lef. 414; Hutchinson *v.* Gascoigne, Holt, N. P. 507; *Ex parte* Bath, Mont. 82; *Ex parte* Gem, 2 M. D. & D. 99. Persons insuring ships or their freight, or other matters, against perils of the sea, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling: *Ex parte* Herbert, 2 Rose, 248; Hale *v.* Small, 2 Bro. & B. 25; Parker *v.* Wells, Cooke, 58; Summersett *v.* Jarvis, 3 Bro. & B. 2; Bolton *v.* Sowerby, 11 East, 274; Patten *v.* Browne, 7 Taunt. 409; *Ex parte* Salkeld, 3 M. D. & D. 125; *Ex parte* Atk. 1 M. D. & D. 300; Dally *v.* Smith, 4 Burr. 2148; Heanny *v.* Birch, 3 Camp. 233; Port *v.* Turton, 2 Wils. 169; Paul *v.* Dowling, 3 C. & P. 500;

what enlarged the provisions of former statutes in this particular. But still the operation of the law was confined to traders. It will be remembered, however, that the insolvent laws originally differed from the bankrupt laws, in the fact that they were not confined to traders; that is, only a trader could be proceeded against in *invitum*, and being so proceeded against, his debt was discharged. But any debtor liable to arrest might seek relief under the insolvent laws, and would be by them protected from imprisonment.[1] Now, all our present statutes are called insolvent laws; and their operation is very wide. In England, for example, no *feme covert* could be a bankrupt who was not lawfully a sole trader;[2] but here, it may be presumed, that any woman, whether married or not, who by the present or any future law of a State, should be liable to suit upon a debt, could go into insolvency.[3]

An infant cannot be made a bankrupt;[4] but we do not know why he may not be declared insolvent on his own petition; for the modern rule is, that none of his debts are absolutely void,

Ex parte Burgess, 2 G. & J. 183; Heane *v.* Rogers, 9 B. & C. 577; *Ex parte* Bowers, 2 Deac. 99; *Ex parte* Wiswould, Mont. 263; Patman *v.* Vaughan, 1 T. R. 572; *Ex parte* Cromwell, 1 M. D. & D. 158; *Ex parte* Blackmore, 6 Ves. 3; Hankey *v.* Jones, Cowp. 748; Bolton *v.* Sowerby, 11 East, 274; Gale *v.* Halfknight, 3 Stark. 56; *Ex parte* Lavender, 4 D. & Ch. 484; Valentine *v.* Vaughan, Pea. 76; Newton *v.* Trigg, 1 Salk. 109; Mayo *v.* Archer, 1 Stra. 513; Stewart *v.* Ball, 2 N. R. 78; Cobb *v.* Symonds, 5 B. & Ald. 516; Saunderson *v.* Rowles, 4 Burr. 2066; *Ex parte* Meymot, 1 Atk. 196; Millikin *v.* Brandon, 1 C. & P. 380; Colt *v.* Nettervill, 2 P. Wms. 308. Or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided that no farmer, grazier, common laborer, or workmen for hire, receiver-general of the taxes, or member of, or subscriber to any incorporated commercial or trading company established by charter or act of parliament, shall be deemed as such a trader liable to become bankrupt." And in this country it was held, that a distiller whose business consisted in the purchase and sale of grain and the conversion of it into alcohol; and the sale of alcohol, and in the purchase of domestic animals and the sale of them, or of their flesh after being fattened, was of such an occupation as subjected him to the operation of the bankrupt act, on the petition of a creditor. In the matter of Eeles, 5 Law Reporter, 273. And see the instructive opinion of *Conkling*, J., in this case.

[1] Upon this distinction between bankrupt and insolvent laws, which prevailed till recently, see Shee *v.* Hale, 13 Ves. 404; and Rochford *v.* Hackman, 10 E. L. & E. 64.

[2] La Vie *v.* Philips, 1 Wm. Black. 570; *Ex parte* Carrington, 1 Atk. 206. And the wives of convicts may be decreed bankrupts. *Ex parte* Franks, 7 Bing. 762.

[3] Thus in Magrath *v.* Robertson, 1 Desau. 445, it was held that a wife may become a sole trader or dealer by permission of her husband, even without deeds; and she becomes entitled to all her earnings as her separate estate. King *v.* Paddock, 18 Johns. 141; Baker *v.* Barney, 8 Johns. 72.

[4] *Ex parte* Adam, 1 Ves. & B. 494; Stevens *v.* Jackson, 4 Campb. 164; 6 Taunt. 106; S. C. *Ex parte* Moule, 14 Ves. 603; O'Brien *v.* Currie, 3 C. & P. 283; Belton *v.* Hodges, 9 Bing. 365; Thornton *v.* Illingworth, 2 B. & C. 826; Mason *v.* Denison, 15 Wend. 64. But when he had held himself out as an adult, and traded as such two years, it was held that he might be decreed a bankrupt. *Ex parte* Watson, 16 Ves. 265; *Ex parte* Bates, 2 M. D. & D. 337.

but only — if not for necessaries — voidable by him. And therefore unless, or until, they are avoided, he is the same as any other debtor.[1]

A lunatic, while insane, could perhaps incur no debt for which he could be held responsible; unless, possibly for his own benefit, it was permitted to him to make a valid contract for necessaries.[2] In such case, he could become insolvent for that, and he certainly could be declared insolvent on the petition of a guardian, for debts contracted before insanity, or in a lucid interval.[3]

If a debtor attempts to place his property in the hands of assignees, for the benefit of his creditors, this, where there is a bankrupt law, is an act of bankruptcy. That is, the debtor may be proceeded against as a bankrupt, and his voluntary assignment is void, and the assignee appointed under the bankrupt commission, takes all his effects. And this is applied, even where there is no intention to defraud; and even where the debtor provided by the express terms of the assignment, that his effects should be applied and distributed according to the provisions of the bankrupt law.[4] This would now be true in this

[1] Upon this point see the cases cited in the Chapter on Infancy, on the modern doctrine of contracts void and voidable.

[2] See Gore *v.* Gibson, 13 M. & W. 627; Niell *v.* Morley, 9 Ves. 478; McCrillis *v.* Bartlett, 8 N. H. 569; Richardson *v.* Strong, 13 Ired. 106; Baxter *v.* Earl of Portsmouth, 5 B. & C. 170.

[3] Molton *v.* Camroux, 4 Exch. 17, Anon. 13 Ves. 590; *Ex parte* Priddey, Archb. Bankruptcy, 56; *Ex parte* Layton, 6 Ves. 440; Jackson *dem* Caldwell *v.* King, 4 Cow. 207.

[4] Mann *v.* Huston, 1 Gray, 253. Provision is usually made in the bankrupt laws, that all assignments or conveyances shall be void, which are made within a certain time before petition filed, and shall constitute in themselves acts of bankruptcy. Stats. 12 & 13 Vict. c. 106, § 68. In Barton *v.* Tower, 5 Law Reporter, 214, an assignment of their property had been made by two partners, with a direction that it should be distributed among their creditors by the assignees, "in the same manner as if the same were in the hands of an assignee under the bankrupt act of the United States, by virtue of proceedings duly had in bankruptcy." This assignment was held an act of bankruptcy and void. And *Conkling*, J., delivering the opinion of the court, said: "There are three descriptions of fraudulent conveyances, assignments, &c., which bring a merchant, banker, factor, &c., within the operation of the first section of the bankrupt act. 1. Such as are fraudulent, or against the common law, or the provision of such English statutes as have been incorporated into the jurisprudence of this country. 2. (As I am now well satisfied, whatever doubts I may have originally entertained,) such as are voluntarily made, in contemplation of bankruptcy, and for the purpose of giving a preference to one or more of the creditors of the debtor over his other creditors. The making of a conveyance of the description has always been held to be an act of bankruptcy under the English bankrupt law, as being contrary to the policy of law, without any express words in the statute. But in our act they are expressly declared to be 'utterly void, and a fraud upon this act.' 3. Assignments of all the effects of the debtor, whether upon trust for the benefit of his creditors or not, on the ground, first, that the debtor necessarily deprives himself, by such an act, of the power of carrying on his trade; and secondly, that he endeavors to put his property under a course of application and distribution among his creditors, different from that, which would take

country, only where the state statutes expressly or by implication supersede all voluntary assignments, and do not merely offer the relief they provide, to those who seek it, leaving them at liberty to assign their effects for their debts, if they choose to do so.[1]

SECTION V.

OF THE PROOF OF DEBTS.

As the insolvent laws purpose to divide all the assets of the debtor ratably among all the creditors, it follows that they open the way very widely to all persons who have claims to present and prove them. This proof is made, in the first place, by the oath of the creditor, and if further proof be required, by such evidence as would be admissible and appropriate under the general rules of the law of evidence.[2]

The presentation and proof may be, in some degree at least, by agent or attorney; and this is usually provided for in the statutes. In some cases it can only be by an agent or attorney; as, when a corporation is a creditor. In such case, the corporation should act by an attorney specially appointed and authorized in their behalf.[3]

If trustees hold claims against a bankrupt, and present them, it has been said that the *cestui que trust* should join with the trustee.[4] This may be proper in many cases, but in some it

place under the bankrupt law. It is unnecessary to cite authorities to show that such an assignment is an act of bankruptcy in England, because it has been a well settled and familiar rule. It is a sound and useful rule; and there is nothing whatever in the language of our act which requires a different construction in this respect." *Ex parte* Brenerman, Crabbe, 456.

[1] See cases cited above on the subjects of assignments at common law.

[2] This is matter for statute provision, and occurs in the bankrupt and insolvent acts generally. The point came before Judge Story, in a case arising under the National Bankrupt Act of 1841. Foster *v.* Remick, 5 Law Reporter, 406. "Under the particular circumstances, I am satisfied that the oath of the petitioning creditors is not sufficient to establish the existence of their debt. In the ordinary course of proceedings of this sort, the oath of the petitioner is a sufficient proof of the debt to sustain his right; but it is liable to be rebutted by counter proofs, and may be overcome by such proofs. In this case, I think the *primâ facie* evidence of the debt, from the oath of the petitioners, is completely overcome by the proofs on the other side; and therefore the burden of proof is on the petitioners, to establish by evidence beyond the oath, that the debt is a true and subsisting one.

[3] 1 Cooke, 124; Albany Exchange Bank *v.* Johnson, 5 Law Reporter, 313.

[4] In *Ex parte* Dubois, 1 Cox, 310, the Lord Chancellor said: "The reason why a trustee is not permitted to prove the debt *alone* under the commission is, that he must swear to the debt being due to him. Now the debt being only due to him *in trust* for

would be obviously impossible, as where the *cestui que trust* is a young child,[1] or a lunatic,[2] or out of the country. And if she were a married woman, we should doubt the propriety of her joining, unless under some particular provision or peculiar character of the trust.

If the creditor be himself bankrupt, so that his claim has passed into the hands of his assignee, it would seem that the assignee alone might present and prove it in case of necessity, but the practice appears to be to require the creditor's own oath, whenever it can be had.[3] And this is founded on obvious reasons. We think they apply equally to the case of a claim assigned, but not by a bankrupt. The recovery is for the benefit of the assignee; but at common law he must do everything in the name of the assignor. And in such a case, if the assignor alone presents and proves, it might accrue to the benefit of the assignee, and be sufficient. But the more correct way would be for assignor and assignee to join.

If a bankrupt holds claims, of which the legal title is in him, but the beneficiary interests are in others, as, if he be for any purpose a trustee for others, and a balance is due to him in that capacity, or to the fund which he holds representatively, from his general assets, he may present and prove this claim against his own estate.[4]

another, it is rather too great a refinement for him to take such an oath; and if he swear the debt is due to him as trustee only, that is not sufficient, for it does not appear within certainty that the debt has not been paid to the *cestui que trust*. The *cestui que trust* must therefore join the trustee in swearing that no part of the debt has been paid or secured."

[1] *Ex parte* Belton, 1 Atk. 251.

[2] *Ex parte* Maltby, 1 Rose Cases, 387, In the matter of Simmons.

[3] Owen on Bankruptcy, 198, who cites Cooke, 153. The practice certainly would seem to be as stated in the text; yet it seems it might be well held, that where the title has accrued to the assignees at such a time as to enable them to sue the action for the debt, in their own names, and without naming themselves assignees, if the debtor of the estate they represent were solvent, they may prove such debt against the estate of the debtor when insolvent, without the necessity of the oath of the creditor himself. There seems to be no principle on which to found a distinction between these two cases. See the cases upon the distinction as to the form of declaration, where property is acquired after or before decree.

[4] *Ex parte* Shaw, 1 Glyn & J. 127; *Ex parte* Watson, 2 V. & B. 414; *Ex parte* Marsh, 1 Atk. 158; Cooke, 408, S. C.; *Ex parte* Richardson, 3 Maddock, 138; Buck, 202, S. C. But it has been also held, that when such debts are proved by the bankrupt, and the dividend paid, the amount shall not go into the hands of the bankrupt himself, but be deposited to the account of the estate, or paid into court. *Ex parte* Brooks, Cooke, 137; *Ex parte* Leeke, 2 Bro. Ch. 596. In this case, and on this point, the Lord Chancellor said: "I apprehend, in strictness, the bankrupt ought to be admitted a creditor for that which he has, as executor, against his own estate; but it would be evidently improper to suffer the money to come into the hands of the bankrupt. In the present

Debts not yet payable can be proved.[1] If they become due before a dividend, there is no deduction from them. If not, interest is deducted. In general, in order to equalize the claims, interest is cast upon all the claims proved to a certain day; and if a debt is then paid, in whole or in part, interest must be deducted to put it on an equal claim with others. If interest is cast for many years, compound interest is never allowed as such. But we presume that an account would be cast by commissioners of insolvency with annual rests, if it were one which could be so calculated in a suit against the insolvent.[2]

So, persons holding annuities payable by the bankrupt, have been permitted to come in, and have the value of the whole annuity reduced by computation to a single sum, and present and prove that as a debt.[3] In several instances, a wife has been permitted to prove debts against her husband's estate. As, where she held a bond or other legal instrument from him, payable at his death. Or, if there were a settlement made upon her before marriage, and a sum due to her from her husband's estate under that settlement; and a settlement made after marriage, in good faith, and before the husband became, or expected to be, insolvent, would have the same effect.[4]

The assignees, who for many purposes represent the bankrupt,

case, there is nothing but money in the hands of the assignees, and the creditor has such an interest in it as to entitle him to have it retained in court. See also *Ex parte* Llewellyn, Cooke, B. L. 152; *Ex parte* Ellis, 1 Atk. 101; *Ex parte* Shakeshaft, 3 Bro. Ch. 198; *Ex parte* Moody, 2 Rose, 413.

[1] Parslow *v.* Dearlove, 4 East, 438; The leading case of Utterson *v.* Vernon, 4 T. R. 570; *Ex parte* King, 8 Ves. 334; *Ex parte* Mare, id. 335; Hancock *v.* Entwisle, 3 T. R. 435; *Ex parte* Grome, 1 Atk. 115; *Ex parte* Winchester, id. 116; Hammond *v.* Toulman, 7 T. R. 612; *Ex parte* Minet, 14 Ves. 189.

[2] See the preceding chapter on Interest.

[3] *Ex parte* Le Compte, 1 Atk. 251; *Ex parte* Belton, id. 251; 2 W. Black. 1106; Perkins *v.* Kempland; Wyllie *v.* Wilkes, Dougl. 519; Cooke's Bankrupt Law, 138.

[4] Thus it is said, that if a bond or covenant is given by the husband, to pay the wife or her trustees during his life, a sum of money for the benefit of the wife or issue after his death, such a bond may be proved in bankruptcy against his estate. *Ex parte* Winchester, 1 Atk. 116; *Ex parte* Dicken, Buck. 115; *Ex parte* Campbell, 16 Ves. 244; *Ex parte* Gardner, 11 Ves. 40; *Ex parte* Brown, Cooke, 240; *Ex parte* Granger, 10 Ves. 349; Montefiori *v.* Montefiori, 1 W. Bl. 363; Shaw *v.* Jakeman, 4 East, 201. See also *Ex parte* Smith, Cooke, 238; Brandon *v.* Brandon, 2 Wils. Ch. 14; *Ex parte* Elder, 2 Maddock, 282; *Ex parte* Brenchley, 2 Glynn & J. 174. But it is said that a bond given by the husband to pay money for the use of the wife, with a condition by way of defeasance, that the bond shall not be enforced, unless upon the bankruptcy of the obligor, will be void as a fraud upon the creditors of the husband, and cannot be proved against his estate. Lockyer *v.* Savage, 2 Stra. 947; Higinbotham *v.* Holme, 19 Ves. 88; Stratton *v.* Hale, 2 Bro. Ch. 490; *Ex parte* Hodgson, 19 Ves. 206; *Ex parte* Young, 3 Maddock, 124; *Ex parte* Hill, Cooke, 251; Id. *Ex parte* Bennett.

or insolvent, may make any defence to a claim which he could make. Hence, a debt for gaming, or one open to objection as usurious, or one without consideration, may be repelled.[1] So, also, the assignees may make some defences which the bankrupt could not make. As, if one presented a claim for damages for a tort, this may be rejected; at least, a claim for damages for a personal tort, may always be; and the reason seems to be, that the insolvent would not pay them if they were recovered, but that his other creditors would. This, however, is equally true of every other claim or debt, if the whole fund belongs to all the creditors, and cannot pay all in full. The true distinction, on principle, seems to be this:—that, so far as the sum recoverable for tort is only an unliquidated compensation for personal harm, to be ascertained by a jury, and savors of punishment to the wrongdoer, the claim for it cannot be proved as a debt. But when judgment has been recovered for the tort, this takes the place of the original cause of action; and it is a debt which can be proved like any other.[2] In some of the statutes it is expressly provided, that if the claim be for goods or chattels wrongfully obtained by the debtor, it may be proved.

If the claim be merely contingent, that is, if it is to be valid and fixed if a certain event occur, and otherwise not, it may still be proved,—and not like an annuity, &c., by reduction to its present value, but at its full value—the payment of the dividend

[1] See the cases cited *infra*, to the point that the assignees take subject to the same equities as the bankrupt, and are entitled to the same.

[2] In Goodtitle *v.* North, Doug. 584, Lord *Mansfield* seemed to consider the chief distinction as between unliquidated damages, and a certain, definite amount, as would be the case when a judgment had been rendered. The case was an action of trespass for the mesne profits against several defendants—plea by two of them (husband and wife) —that the husband became a bankrupt after the cause of action accrued. To this there was a general demurrer, and in support of the demurrer, it was argued that the statute only speaks of debts due before the bankruptcy, and an injury by entering the plaintiffs' close cannot constitute a debt. It was said that a party cannot, in any case of a tort, liquidate his damages, and swear to it before the commissioners. It could only be ascertained by the intervention of a jury. Therefore no debt for this cause of action could have been proved; and therefore the bankruptcy was no bar. In reply, it was admitted that bankruptcy is no bar to demands for torts in general. But it was urged, that though in this case the *form* of the action was trespass, yet the demand, in substance, was for a debt, viz., the annual value of the land, and might have been the subject of an action for use and occupation, in bar to which the bankruptcy would be clearly pleadable. Lord *Mansfield* said: "The *form* of the action is decisive. The plaintiff goes for the whole damages occasioned by the tort, and when damages are uncertain, they cannot be proved under a commission of bankruptcy." And *Buller*, J., added: "The damages here are as uncertain as in an action of assault." Parker *v.* Norton, 6 T. R. 695; Parker *v.* Crole, 5 Bing. 63; S. C. 2 Moore & Payne, 150; Shoe-

depending, however, upon the happening of the event which is to make the claim valid.[1]

If a party holds a note which the bankrupt has indorsed, or made only to accommodate the holder, as there is no consideration for it, it cannot be proved. And, on the other hand, if the bankrupt holds a note made or indorsed to him without consideration, and for accommodation only, this note would not pass to the assignee as part of the bankrupt's assets.[2] We should apply the same principle to the case of two promissory notes, both accommodation in so far as they were given for each other, that is, exchanged notes. Here, if at the time of the bankruptcy neither party had used his note, we should say, that each should be returned, and not that the holder of the bankrupt's note should take his dividend, and pay the whole of the note given by him

maker *v.* Keely, 2 Dall. 213; S. C. 1 Yeates, 245; Williamson *v.* Dickens, 5 Ired. (Law) 259; Comstock *v.* Grout, 17 Vt. (2 Washb.) 512.

[1] Provision for contingent debts is made in the Statutes of Bankruptcy and Insolvency, both in England and America. A distinction was taken in England under this provision, between debts payable on a contingency, and contingent liabilities, which might never become debts, and it was held that only the former could be proved under the statute. *Ex parte* Marshall, 1 M. & Ayr. 145; S. C. 3 Dea. & Chit. 120; Abbott *v.* Hicks, 5 Bing. N. C. 578; Hinton *v.* Acraman, 2 C. B. (M. G. & S.) 367; *Ex parte* Harrison, 3 M. D. & D. 350. On the subject of proof of contingent debts, and what are provable as such, see *Ex parte* Marshall, 2 Dea. & Chit. 589; S. C. 1 M. & B. 242; *Ex parte* Tindal, 1 Moore & Scott, 607; S. C. Mont. 375, 462; 8 Bing. 402; Atwood *v.* Partridge, 12 Moore, 431; 4 Bing. 209, S. C.; Boorman *v.* Nash, 9 B. & C. 145; Green *v.* Bicknell, 8 Ad. & Ell. 701; *Ex parte* Lancaster Coal Co. Mont. 27; *Ex parte* Fairlee, Mont. 17; *Ex parte* Myers, Mont. & B. 229; S. C. 2 Dea. & Ch. 251; Abbott *v.* Hicks, 7 Scott, 715; Hope *v.* Booth, 1 B. & Ad. 498; *Ex parte* Simpson, 1 M. & Ayr. 541; S. C. 3 Dea. & Ch. 792. Debt defeasible on a contingency provable. Staines *v.* Planck, 8 T. R. 389; Yallop *v.* Ebers, 1 B. & Ad. 698; Filbey *v.* Lawford, 4 Scott, N. R. 208; *Ex parte* Eyre, 1 Phil. C. C. 227; Lane *v.* Burghart, 1 Q. B. (Ad. & Ell. N. S.) 933, 4 Scott, N. R. 287; 3 M. & G. 597, S. C. *Ex parte* Littlejohn, 3 M. D. & D. 182; *Ex parte* Hope, id. 720; Taylor *v.* Young, 3 B. & Ald. 521; *Ex parte* Hooper, 3 Dea. & Ch. 655; *Ex parte* Turpin, 1 Dea. & Ch. 120; Lyde *v.* Mynn, 1 Myl. & K. 683; *In re* Willis, 19 L. J. Exch. 30; *In re* Foster, 19 L. J. C. P. 274. See 1 Cooke's Bankrupt Law, 190; Owen on Bankruptcy, 179; Stat. 12 & 13 Vict. c. 106, §§ 77, 78; Act of Congress, 1841, § 5.

[2] It seems that the same principles will govern the case of accommodation paper, when proof of it is attempted against a bankrupt's estate, which would apply if suit had been brought upon it against the bankrupt; and the same reasons, hold when the bankrupt has given accommodation notes or acceptances. It is clear on the authorities, that no action could be maintained in either of the above cases. Smith *v.* Knox, 3 Esp. 46; Fentum *v.* Pocock, 5 Taunt. 192; Thompson *v.* Shepherd, 12 Met. 311; Brown *v.* Mott, 7 Johns. 361; Grant *v.* Ellicott, 7 Wend. 227; Charles *v.* Marsden, 1 Taunt. 224; Carruthers *v.* West, 11 Q. B. (Ad. & Ell. N. S.) 143; Renwick *v.* Williams, 2 Maryl. 356; Molson *v.* Hawley, 1 Blatch. 409. If the accommodation bill is in the hands of a third party, who took it *bonâ fide*, even with notice of its being an accommodation bill, he may prove against the estate of either party to it, and recover a dividend on it to the amount due him. Smith *v.* Knox, above cited, and 5 Taunt. 192; *Ex parte* Bloxham, 6 Ves. 449, 600; *Ex parte* Bloxham, 8 Ves. 531; Bank of Ireland *v.* Beresford, 3 Dowl. 238; *Ex parte* King, Cooke, 177; *Ex parte* Lee, 1 P. Wms. 782. See Jones *v.* Hibbert, 2 Stark. 304.

to the bankrupt.[1] Each note was a good legal consideration for the other; but the principle of accommodation paper should apply to both. If, however, either of the notes had been used and transferred to a third party, this principle would no longer be applicable.

At common law, if one guarantees a debt for another, in any form, as a surety, or as an indorser, he has no legal claim against that other until he pays the debt. Therefore he cannot, before such payment, compel the party for whom he is surety, to give him security or indemnity; all he can do is, to pay the debt, and then bring his action for damages. It is not so, however, under the bankrupt or insolvency law. Here, the fact of the debtor's insolvency carries with it the inference that the surety will have to pay the debt he has guaranteed. The surety is, therefore, permitted to come in and prove as his claim the whole amount for which he is surety. But it is in the nature of a contingent claim. And no dividend is paid to him excepting on the sum which he has actually paid under his obligation as surety.[2]

[1] See with reference to this point, *Ex parte* Walker, 4 Ves. 373; *Ex parte* Earle, 5 Ves. 833; *Ex parte* Read, 1 Glynn & J. 224; *Ex parte* Bloxham, above cited; Stedman *v.* Martinnant, 13 East, 427. A similar principle is adopted with regard to mutual credits—the object in view being, that when two persons have dealt together on mutual credits, and one of them becomes bankrupt, the account shall be settled between them, and the balance only, payable on either side, shall be claimed or paid; and this was the practice long before any statutory provision on the subject. Anonymous, 1 Mod. 215; Chapman *v.* Derby, 2 Vern. 117; *Tindal*, C. J., in Gibson *v.* Bell, 1 Bing. N. C. 753; Bolland *v.* Nash, 8 B. & C. 105; Boyd *v.* Mangles, 16 M. & W. 337; Hewison *v.* Guthrie, 3 Scott, 298; Russell *v.* Bell, 1 Dowl. N. S. 107; Hulme *v.* Mugglestone, 3 M. & W. 30; Young *v.* Bank of Bengal, 1 Deac. 622; Rose *v.* Hart, 8 Taunt. 499. See the learned note on this case, 2 Smith's L. C. 172, wherein the cases upon this point are collected and discussed. Rose *v.* Sims, 1 B. & Ad. 521; Abbott *v.* Hicks, 7 Scott, 715; Groom *v.* West, 8 Ad. & Ell. 758; Tamplin *v.* Diggins, 2 Camp. 312; Ridout *v.* Brough, Cowp. 133. The debts must be due in the same right. Forster *v.* Wilson, 12 M. & W. 191; *Ex parte* Blagden, 2 Rose, 249; Yates *v.* Sherrington, 11 M. & W. 42; 12 id. 855; Belcher *v.* Lloyd, 10 Bing. 310.

[2] Vansaudan *v.* Corsbie, 3 B. & Ald. 13; Young *v.* Taylor, 2 Moore, 326; S. C. 8 Taunt. 315. It is said, in 1 Cooke's Bankrupt Law, 210, that "the surety is held to have an equitable right to stand in the place of the original creditor, and receive dividends upon his proof." *Ex parte* Findon Cooke, 170; *Ex parte* Brown, id. (cited in Owen on Bankruptcy, 180); Toussaint *v.* Martinnant, 2 T. R. 100; Martin *v.* Brecknell, 2 M. & Selwyn, 39. It seems that in England, prior to the statute of 49 Geo. 3, c. 121, § 8, the surety had no power to come in and prove his claim against the estate of his bankrupt principal, before being called on himself to pay the debt. See Cooke's Bankrupt Law, above cited, and *passim;* Eden on Bankruptcy, 158–177, and the cases cited above, of an earlier date than 1808. But the provision then enacted has been continued to this day, and may be considered part of the common law of bankruptcy in this country. *Ex parte* Young, in the matter of Slaney, 2 Rose Cases, 40; Aflalo *v.* Fourdrinier, 6 Bing. 306; Wood *v.* Dodgson, 2 Maule & S. 195. *Bayley*, J., in delivering his opinion, said, with reference to this point: "The intention of the legislature, at the same time that they relieved the bankrupt, was to confer a benefit also on the

There is, however, a limitation to this right of the surety. He can prove his claim only when the debt already exists, although it may not now be payable. Thus, a surety for rent may prove for the rent due and unpaid, but not for any future rent. For this may never become due; as the tenant may be ousted, or something else occur to defeat the claim for rent.[1]

There seems to be no way in which a surety may compel the

surety or person who was liable for the debt of the bankrupt. The principal creditor might have proved under the commission, or might have resorted to the surety without proving under the commission; therefore, before the act, he might have compelled the surety to pay the whole amount without the surety's having any benefit under the commission. This clause, therefore, was intended to remove that inconvenience, and to give to the surety the power of obtaining a dividend in respect of his debt." The Supreme Court of the United States, in the construction of the similar section of the late national bankrupt law, unhesitatingly adopted the same view. Mr. Justice *McLean*, delivering the opinion of the court, said: "Wells, as surety, was within this section, and might have proved his demand against the bankrupt. He had not paid the last note, but he was liable to pay it as surety, and that gave him a right to prove the claim under the fifth section. And the fourth section declares that from all such demands the bankrupt shall be discharged. This is the whole case. It seems to be clear of doubt. The judgment of the State court is reversed." Mace *v.* Wells, 7 How. 272. (The judgment of the Supreme Court of Vermont in this case will be found; Wells *v.* Mace, 17 Vt. [2 Washb.] 503.) The view of the later English cases, and of the Supreme Court of the United States, will be found adopted in Morse *v.* Hovey, 1 Sandf. Ch. 187; Butcher *v.* Forman, 6 Hill, 583; Crafts *v.* Mott, 4 Comstock, 603, decided as late as 1851; Dunn *v.* Sparks, 1 Carter, (Ind.) 397; and recognized in Holbrook *v.* Foss, 27 Maine, 441; Pike *v.* McDonald, 32 id. 418; Leighton *v.* Atkins, 35 id. 118. These were cases where the foundation of the plaintiffs' claims was payment of certain judgments recovered against the defendants and their sureties (of which number were the plaintiffs) after the discharge of the defendants, which judgments, therefore, were not provable in bankruptcy. The distinction taken by the court, admitting the authority of Mace *v.* Wells, &c., was, as laid down by Shepley, J., in one of the cases, that the contract upon which a judgment at law has been recovered, is merged in and extinguished by the judgment which constitutes a new debt, having its first existence at the time of its recovery. So that, where a judgment had been recovered on a promissory note, (27 Me. 441,) the note, by virtue of which it had been recovered, no longer continued to be a debt due from the defendant to the plaintiff. The judgment not being a debt due from the defendant at the time when his petition was filed, could not have been proved in bankruptcy against him. Comfort *v.* Eisenbeis, 11 Penn. State, 13.

[1] The cases cited in the preceding note. Also, Welsh *v.* Welsh, 4 Maule & S. 333. In M'Dougal *v.* Paton, 8 Taunt. 584, this precise question came before the court. It was an action of *assumpsit* for money paid; the defendant pleaded his bankruptcy and certificate, and that the plaintiff, before the issuing of the commission, was surety for the defendant's debt, and that the money paid was paid by the plaintiff, as his surety, after the issuing of the commission, and before a final dividend. Replication that the plaintiff, before issuing the commission, was surety to J. for the defendant, that the defendant should perform articles of agreement by which an annual rent was to be paid by the defendant; that, after his bankruptcy, rent became due by the defendant, and that the money was paid by the plaintiff, as the defendant's surety, by reason of the defendant's non-payment, and for the costs of an action by J. against the plaintiff, as surety. Demurrer: and Pell, Sergt., argued that this was a debt within 49 Geo. 3, c. 121. *Dallas*, C. J., said: "We will consider this case. For myself, I have no doubt that a debt, to fall within the statute, must be a debt existing at the time of the commission. But though to me the case is clear, I have no objection to the case standing over for a further consideration of the authorities by the court." At a later day, Dallas, C. J., informed Pell that the court saw no reason to change the opinion they had expressed in this case. S. C. 2 Moore, 644. See *Ex parte* Minet, 14 Ves. 189.

party whom he guarantees, to prove his claim and take his dividend from the assets of the debtor.[1] This would, of course, diminish the liability of the surety just so far; and the surety ought to have the power of requiring this. In practice, a surety can only pay the debt, whether due or not, and is then subrogated to all the rights of the principal creditor.[2] This prevents, probably, any practical mischief. And if the creditor, relying on his surety, and at the same wishing to distress his surety, refused the payment tendered to him, and also refused to prove his debt, undoubtedly such conduct would be considered as a negligence or fraud, which would discharge the surety. For, to all suretyship there must be attached the general condition that the creditor shall do all that can reasonably be asked of him to secure the debt from the principal, or permit the surety to do it.

SECTION VI.

OF CREDITORS WITH SECURITY.

A creditor who holds security as collateral to his debt, may prove the balance due to him, after deducting the value of the security. This value may be ascertained by the creditors' selling it, or, under our bankrupt law, by having it appraised, and taking it at its appraised value. In general, if he has any liens whatever for his debt, he must make them reduce his debt as far as possible, or otherwise make them available to the assets, as by surrendering them to the assignees.[3]

Our act of 1841, section 2, expressly provided that it should in no wise impair "any *liens*, mortgages or other securities on property real or personal which might be valid by the laws of the States respectively. This clause was necessary, not only for other reasons, but because of the great diversity in our state laws

[1] See Owen on Bankruptcy, 182.

[2] The cases cited *supra*.

[3] This matter is usually provided for by statute. The English bankrupt law, 12 & 13 Vict., and the late national bankrupt law of the United States, have provisions to this general effect. Act of Congress, 1841; Owen on Bankruptcy, 193. English cases on this subject: *Ex parte* Prescott, 3 Dea. & Ch. 218; *Ex parte* Rufford, 1 Glynn & J. 41; *Ex parte* Dickson, 2 M. & Ayr. 99; Ward *v.* Dalton, 7 C. B. (M. G. & S.) 643; and *Ex parte* Goodman, 3 Madd. 373; *Ex parte* Parr, 1 Rose, 76, 18 Ves. Jr. 65; *Ex parte* De Tasted, 1 Rose, 324; *Ex parte* Wildman, 1 Atk. 109; *Ex parte* Bennet, 2 Atk. 527.

as to liens. In some, an action commenced, seems to operate as a lien on the defendant's property.[1] In others there is no lien until the property is attached; and this is regulated in many different ways; in some, for example, being permitted on mesne process, and in others not.[2] Judge Story even held that an attachment on real estate, at the commencement of the suit, in a State in which it was permitted by law, and every day's practice, and had been always spoken of by the courts as a "lien," was nevertheless none under the bankrupt law, and that such attachment was superseded and avoided by that law. He however conceded that a lien by a judgment was recognized by the statute and valid against it.[3] The same or a similar question coming before other judges of the United States courts was decided in different ways. It afterwards came up before the Supreme Court of New Hampshire, which — Chief Justice Parker delivering the opinion — elaborately and fully sustained the doctrine that such attachment was a lien, to be respected by the bankrupt law. And so far as subsequent adjudication instructs us, we are satisfied that the New Hampshire view is adopted not only by the state courts, but, substantially, by those of the United States.[4]

[1] Watson *v.* Wilson, 2 Dana, 406; Newdigate *v.* Lee, 9 Dana, 17; Robertson *v.* Stewart, 2 B. Mun. 321. See Hodges *v.* Holeman, 1 Dana, 50.

[2] Wheeler *v.* Fisk, 3 Fairf. 241; Robinson *v.* Mansfield, 13 Pick. 139; Pomroy *v.* Kingsley, 1 Tyler, 294; Carter *v.* Champion, 8 Conn. 549; Dunklee *v.* Fales, 5 N. H. 528; Kittredge *v.* Bellows, 7 id. 427; Fettyplace *v.* Dutch, 13 Pick. 392; Arnold *v.* Brown, 24 Pick. 95; Grosvenor *v.* Gold, 9 Mass. 210.

[3] In the matter of Cook, 2 Story, 380. "I have never doubted that the lien of a judgment at the common law upon real estate since the Statute of Westminster, 13 Edward 1, stat. 1, c. 18, which has been adopted in many States in the Union, is within the proviso of the second section of the Bankrupt Act of 1841, and saved thereby, and is wholly unaffected by the proceedings in bankruptcy, when it has been obtained in the regular course, before any petition or decree, or discharge in bankruptcy. See to the point, that a judgment is a lien on the property of a defendant. Conard *v.* Atlantic Ins. Co. 1 Pet. 386; Cathcart *v.* Potterfield, 5 Watts, 163; Van Renssalaer *v.* Sheriff of Albany, 1 Cow. 501; Ridge *v.* Prather, 1 Blackf. 401; United States *v.* Morrison, 4 Pet. 124; Porter *v.* Cocke, Peck. 30; Moliere *v.* Noe, 4 Dall. 450; Kerper *v.* Hoch, 1 Watts, 9; Codwise *v.* Gelston, 10 Johns. 507; Coutts *v.* Walker, 2 Leigh, 268; Mut. Assurance Soc. *v.* Stanard, 4 Munf. 539; Roads *v.* Symmes, 1 Ham. 140; Towner *v.* Wells, 8 id. 136; Talbert *v.* Melton, 9 Sm. & M. 9; Buckingham *v.* McLean, 13 How. 151; Pollard *v.* Cocke, 19 Ala. 188; Byers *v.* Fowler, 7 Eng. (Ark.) 218.

[4] The cases upon this conflict of laws, with regard to the effect of an attachment in creating a lien, are cited in this note. They are more fully considered in the notes to the chapter on Bankruptcy and Insolvency, in the 2nd vol. of Parsons on Contracts. The principal conflict arose between the Circuit Court of the United States for the first circuit, and the Superior Court of Judicature in New Hampshire. The doctrine which is referred to in the text as emanating from Judge Story, was first laid down in the case of *Ex parte* Foster, 2 Story, 131, 5 Law Repofter, 55, S. C. This case was cited and considered in Kittredge *v.* Warren, 14 N. H. 509; and an opposite opinion on this point was adopted by the court. It was held that an attachment of property upon

SECTION VII.

OF THE ASSIGNEE.

The assignee is usually selected or chosen by the creditors, at their first meeting; a majority in value of the creditors choosing, with some restrictions, that such a number must concur in the choice, in order to prevent one or two very large creditors from deciding the question. If the creditors fail, or decline, to choose, usually the judge or commissioner presiding may appoint. The assignee, or assignees, thus chosen, must signify their assent within a certain time, which is usually, a short one.[1]

mesne process, *bonâ fide* made before any act of bankruptcy was a lien or security upon property, valid by the laws of New Hampshire, and within the proviso of the second section of the bankrupt act. In the matter of Bellows *v.* Peck, 5 Law Reporter, 119, this matter came again before the Circuit Court, Judge Story presiding, and the authorities and especially Kittredge *v.* Warren, considered at length. The opinion of the court in *Ex parte* Foster, was reaffirmed, and going further, it was held, that where an attachment on mesne process was made, and the defendant subsequently obtained his discharge in bankruptcy, and a state court where the case was pending should, as in Kittredge and Warren, hold that the attachment prevailed as against the subsequent proceedings; and the discharge invalid as against creditors who had secured their rights by such attachment; it would be the duty of the District Court to grant an injunction against the creditor, his agent and attorneys, and the sheriff who had charge of the property attached, to restrain the creditor from proceeding to judgment, or if the suit had been prosecuted to judgment, to restrain him from levying his execution on the property attached, or if the property had been sold under the execution, to compel the sheriff to bring the money into court. In Kittredge *v.* Emerson, 15 N. H. 227, which came before the court of New Hampshire subsequent to the decision in Bellows *v.* Peck, the doctrines of that case were assailed, and that of Kittredge *v.* Warren, affirmed, with conspicuous ability, by Mr. Chief Justice Parker, in an opinion of great length, in which the cases are reviewed, both with regard to the matter of attachment, and the power of the courts of the United States to grant injunctions to restrain plaintiffs in the state courts from pursuing their rights and remedies in those tribunals. And denying this power, and in order to be clearly understood, the court say that if such plaintiffs shall ask their interference, it will be their duty to enjoin and prohibit any person from attempting to procure any process, from any court not acting under the authority of the State of New Hampshire, with a view to prevent the entry of judgments in such suits, or to prevent the execution of the final process issued upon those judgments, when obtained. This matter is considered also by Prentiss, J., in the District Court of Vermont. Downer *v.* Brackett, 5 Law Reporter, 392, where a view is adopted like that of the court of New Hampshire above cited. Houghton *v.* Eustis, 5 Law R. 505. The view adopted by Mr. Justice Story was concurred in by Conkling, J. In the matter of Allen, 5 Law Reporter, 362. The following cases are cited in verification of the last paragraph of the text on this subject. Tyrell's Heirs *v.* Rountree, 1 M'Lean, 95; S. C. in Error, 7 Peters, 464; Wallace *v.* M'Connell, 13 Pet. 151; Beaston *v.* Farmers' Bank of Delaware, 12 Pet. 128; Savage *v.* Best, 3 How. 111; Peck *v.* Jenness, 7 How. 612; Colby *v.* Ledden, id. 626; Shawhan *v.* Wherritt, id. 627; Downer *v.* Brackett, 21 Vt. 599; Shaffer *v.* McMakin, 1 Smith, 148; S. C. 1 Carter, (Ind.) 274; Langford *v.* Raiford, 20 Ala. 532; Kilborn *v.* Lyman, 6 Met. 299; Hubbard *v.* Hamilton Bank, 7 Met. 340; Davenport *v.* Tilton, 10 Met. 320.

[1] But by the provisions of some of the bankrupt and insolvent laws, the power of appointment is vested in the court. See § 3 of the late National Law. And where

It is his duty to act as a faithful trustee for all concerned; and

such power is vested in the court, no person will ordinarily be appointed who is interested in the bankrupt estate. Nor any person who has an interest hostile to that of the creditors. *Ex parte* De Tasted, 1 Rose, 324; *Ex parte* Surtees, 12 Ves. Jr. 10. And if accidentally a large proportion of the creditors have been absent at the choice of the assignee, a new choice may be ordered. *Ex parte* Greignier, 1 Atk. 91; *Ex parte* Hawkins, Buck. 520; *Ex parte* Dechapeaurouge, 1 M. & McA. 174; *Ex parte* Edwards, Buck, 411. And if after choice made, the commissioner should decide that the person chosen is for any reason unfit for the discharge of the duties, and refuse to admit him to the care of the estate, an appeal lies to the Supreme Court of bankruptcy. *Ex parte* Candy, 1 M. & McA. 197. And the court also in general has power to remove an assignee who proves incompetent from any reason, to discharge his office; or if there has been a fraud in procuring the appointment. In *Ex parte* Shaw, 1 Glynn & J. 157, Lord *Eldon* said: "Assignees owe a duty to every creditor, and each creditor owes a duty to the other creditors. With respect also to the solicitors under the commission, I can only say, that it sometimes happens that the best men are employed for parties having adverse interests, yet I cannot permit my observations to be closed, without saying that it is the duty of the solicitor employed by the bankrupt, if he find that he is employed by the assignees, to see that he can do his duty to every creditor, as well as to the bankrupt. If he is the agent of all he must do his duty to each and all of them, however difficult it may be to discharge that duty. I must say, that I never saw proceedings in any bankruptcy in which there was a necessity for the interference of the court more imperious than in this, for whether Carroll can or cannot prove the rest of his debt (and it would be improper in me to express an opinion on that part of the subject, even if I had formed an opinion upon the merits of it), yet I cannot read the proceedings without observing, that the case calls for much adverse examination. I take into consideration all the other circumstances that have occurred, and without saying whether if I were bound to decide this question merely upon the interposition of the bankrupt, I could get satisfactorily to the conclusion what were the motives which induced the nomination of these parties; after a laborious research into the evidence I have no difficulty in stating, that, taking the case altogether, if the nomination had been carried into execution by assignment, I should have been of opinion that Carroll stands under circumstances, in which he should not be assignee." The case was, a petition to remove assignees under a commission of bankruptcy, and to charge interest for money, part of the bankrupt's estate, received by one of the assignees, paid in at his banker's, to his own account, and used as his own property. The Lord Chancellor said: "Under these circumstances, therefore, the former assignees having been actually discharged for this very reason, using money, part of the bankrupt's estate, as their own, the new assignees chosen in execution of the principle respecting such use of the property, no substantial reason appearing for not having made this money the subject of dividend, being taken by this person, one of the new assignees, placed by him at his banker's, used as his own money, his clerk furnished with authority to draw it out, as he pleased, and actually doing so, I must, by enforcing this rule, if possible, convince persons, standing in the situation of trustees, as assignees in bankruptcy, that they are not to make use of the bankrupt's estate for their own private purposes. For that reason alone I shall direct a meeting to be called for the purpose of choosing an assignee instead of that one, who has made this use of the property." And in an early case, *Ex parte* Haliday, 7 Vin. Abr. 77, where the commissioners of the bankrupt's estate had charged more than 20*s.* apiece at each meeting, and likewise ordered great sums to be charged for their eating and drinking, the Lord Chancellor declared them incapable of longer holding their office. *Ex parte* Reynolds, 5 Ves. Jun. 707. So if the assignee remove from the State in which the decree issued, or beyond the jurisdiction of the court by which the decree was issued. In *Ex parte* Grey, 13 Ves. 274, the Lord Chancellor said: "I am clearly of opinion that the assignee ought to be removed. He is trustee for the bankrupt and the creditors. Yet, whilst he is resident in Scotland, I have no hold over him, and can reach him with no process." Belchier *v.* Parsons, 1 Kenyon & Hanmer, 44. "I am of opinion that there are no grounds to make Mrs. Parsons answerable in this cause for any more of the money than what she actually received. Were it once to be laid down, as a rule in this court, that an assignee or trustee, should be answerable in all events for the people they employ, no man in his senses would ever undertake those offices. In the case of executors and administrators, the common law does, in most cases, consider the persons receiving by their direc-

with impartial justice to all.[1] It would be impossible to enumerate all his duties. The principal among them are, to ascertain the regularity and sufficiency of the proceedings thus far; to take immediate possession of all the assets of the insolvent, and demand and take any necessary steps to collect all outstanding assets of every kind.[2] And he must take due care of the prop-

tious only as the hands by which they receive; and this court likewise, to preserve some consistency with the common law, does confine them to stricter rules, and what is a devastavit at law, must be so here. But in the case of trustees and assignees particularly, who are acting immediately under the authority of this court, it has always admitted of greater latitude; nay, in the former case, this court, and sometimes even the courts of law, have dispensed with that rigor. In cases of this kind, it is not to be expected that the assignees will themselves attend to the disposition of the bankrupt's effects, and less so still in the present case, for the son of the person whom the creditors have thought proper to choose assignee; nor would it indeed be for the benefit of the creditors, if they did; brokers, and such sort of people, being more conversant with the effects to be disposed of, better judges of their value, and more capable of disposing of them to advantage."

[1] And the duties of an assignee are spoken of in the books as closely resembling those of trustees. Belchier *v.* Parsons, 1 Kenyon & Hanmer, 44; Lord Eldon held, that an assignee or trustee is not liable for accidental losses without blamable negligence. S. C. *Ex parte* Belchier, Amb. 218; Primrose *v.* Bromley, 1 Atk. 89; *Ex parte* Lane, ib. 90. And if the assignee appoint an agent, he must exercise the care that is required of a trustee in such selection. Belchier *v.* Parsons, (above cited); 1 Atk. 87. In the matter of the Earl of Litchfield, where Lord Hardwicke held an assignee liable for loss who had appointed as clerk "a person of very little credit," and "did not consult the body of the creditors who are his *cestui que trusts*." Knight *v.* Plimouth, 3 Atk. 480; Adams *v.* Claxton, 6 Ves. Jun. 226. And the same doctrine is laid down by Tindal, C. J., in Raw *v.* Cutten, 9 Bing. 96. But the general authority of assignees cannot be delegated. Montagu's Cases in Bankruptcy, 93; Douglas *v.* Browne.

[2] And to enable him to do so it is usually provided, that the clerk or other officer of the court of bankruptcy shall on the day of the issuing of the decree, deliver to the assignee a certified copy of the decree. Late U. S. National Bankrupt Law. But a discretionary power is vested in the assignee in this respect, and any property, the possession of which would be a burden rather than a benefit to the estate, may be declined. Nias *v.* Adamson, 3 B. & Ald. 225; Wheeler *v.* Bramah, 3 Camp. 340; Turner *v.* Richardson, 7 East, 335; Copeland *v.* Stephens, 1 B. & Ald. 593; Bourdillon *v.* Dalton, 1 Esp. 233. In Smith *v.* Gordon, 6 Law Rep. 313, *Ware*, J., said: "By the Bankrupt Act all the property and rights of property of the bankrupt, by force of the decree of bankruptcy, pass to the assignee by operation of law, and become vested in him as soon as he is appointed. But though the legal title passes, he is not bound to take possession of all. It is perfectly well settled with respect to leasehold estates, under the English bankrupt laws, that the assignee is not bound to take the lease and charge the estate with the payment of rent. Copeland *v.* Stephens, (1 Barn. & Alderson, 573). The rent may be greater than the value of the lease, and thus the estate may be burdened instead of being benefited by taking the lease, and in such a case the *damnosa hereditas* may be abandoned by the assignee. I have had occasion to consider this question in another case, and I came to the conclusion that this doctrine equally holds under our bankrupt law. *Ex parte* Whitman, December, 1842. And I take the principle to be a general one, that the assignee is not at least ordinarily bound to take into his possession property, which will be a burden instead of a benefit to the estate. If the assignee elects a right not to take, the property remains in the bankrupt, and no one has a right to dispute his possession. His possessory title is good against all the world but his assignee. Webb *v.* Fox, (7 Term R. 391); Fowler *v.* Down, (1 Bos. & Pull. 44). Thus in this case if the assignee elected not to take the right of the bankrupt, and charge the estate with the costs of a suit in equity, the issue of which was uncertain, the right, whatever it was, remained in the bankrupt, and might be pursued by any creditor who had not proved under the bankruptcy." But if he accepts such property, he is liable for the covenants in the lease. Holford *v.* Hatch, Doug. 183.

erty thus collected. In general, he is clothed with the power and is subject to the responsibilities and disabilities of a trustree.[1] Thus, if he sells any property of the insolvent, he cannot buy it himself. He may compound debts due, or otherwise arrange for them, but on his own responsibility, unless under order of the supervising court, which it is always prudent, and perhaps necessary, to obtain, previous to any action of the kind. And the same thing is true of any temporary investment, or any change of investment of the assets. Generally, he should deposit all moneys as soon as collected, in some bank of perfectly good credit, and to the special account of the fund of the assignment.[2] He may redeem mortgages or pledges; but here, also, he should obtain the sanction of the court.[3] So he may transfer notes payable to the insolvent by indorsing them in his own name. And where a note was actually transferred before insolvency, by the insolvent, to a *bonâ fide* holder, and the insolvent intended to indorse the same, but neglected to do so, the assignee may indorse it for the holder.[4]

It is undoubtedly the rule that, when the assignee acts in the discharge of simple and ordinary duties, he is liable only for want of ordinary skill and care.[5] But, as he may have the order of the court in all extraordinary cases, if he does not obtain this, but acts on his own judgment, he is held to a more stringent responsibility. It is not always easy to draw the line between

[1] And his responsibility as trustee has been so strictly construed, that an assignee, who was an accountant, was not allowed to charge for his services in that capacity. See *Ex parte* Read, 1 Glynn & J. 77; *Ex parte* Turner, 1 Mont. & McA. 52.

[2] *Ex parte* Reynolds, 5 Ves. Jun. 707; *Ex parte* Beaumont, 3 Dea. & Chit. 549. The elaborate and learned opinion of Lord Eldon, in *Ex parte* Lacey, 6 Ves. Jun. 625, where the close resemblance in the liability of an assignee to that of a trustee is fully set forth. *Ex parte* James, 8 Ves. 337; *Ex parte* Alexander, 2 Mont. & Ayr. 492; *Ex parte* Turvill, 3 Dea. & Ch. 346; *Ex parte* Bage, 4 Mad. 459; *In re* Salisbury, Buck, 245; Davis *v.* Simpson, 5 Har. & John. 147; De Caters *v.* Le Ray De Charmant, 3 Paige, 178; Davoue *v.* Fanning, 2 Johns. Ch. 256; Richardson *v.* Jones, 3 Gill & J. 163. The duties and responsibilities of the assignee are well set forth in Owen on Bankruptcy, p. 235 *et seq.*

[3] As to right of redemption of a mortgage, see Pope *v.* Onslow, 2 Vern. 286.

[4] *Ex parte* Mowbray, Jac. & W. 428. This was a petition praying that assignees might be ordered to indorse a bill of exchange which had been transferred before the bankruptcy for valuable consideration, but without indorsement; if the bill was not indorsed, the petitioner claimed to be a creditor for the amount. Lord Chancellor *Eldon:* "The difficulty is, to frame an order which shall provide for a special indorsement, that will prevent the assignees from being personally liable. But if a special indorsement is made, and the petitioner will be content with it, I see no reason why I should not make the order; if he is not satisfied with that, he must apply again."

[5] *Ex parte* Belchier, Amb. 218, above cited.

these two classes of cases. The statutes provide for some of them; practice, or the obvious reason of the thing, for more; and where there is any doubt, it is always in the power and always prudent for the assignee to have the direction and authority of the court.

The assignee is, in general, subject to the same equities as the insolvent; where title to any thing is not confirmed by passing to the hands of the assignee, even where it would be so by transfer for value to a third party.[1] Thus, if a negotiable note were held by an insolvent, under circumstances which would give to the promisor a good defence if he were sued by the insolvent himself, but not if he were sued by a third party, the same defence may be made to the action if it be brought by the assignee.

We have said that the assignee is bound to take possession of the whole estate of the insolvent. But here also he has, and should exercise, a discretion. If the property be incumbered by liens, or obligations, which would reduce its value to nothing, and for which the assignee makes himself or his fund responsible by taking possession, he may and should decline the possession. Leasehold property, for example, may be held by the insolvent on terms which require him to pay more than it is worth; and if the assignee takes possession of this property under the assignment, he would be liable for the rent. This he should avoid.[2] But here also, we repeat, he would be safest in acting under the direction of the court.

The assignee may sue in his own name, even upon covenants made with the insolvent.[3] And all the assignees should join in

[1] *Ex parte* Hanson, 12 Ves. 346. Lord Chancellor *Erskine:* "There is a clear principle that decides this case, that assignees in bankruptcy take, subject to all equities, attaching upon the bankrupt; and as the condition of the bankrupts, if they had continued solvent, would, as between them and these persons, be such as I have represented, that must be the condition of the assignees." *Ex parte* Herbert, 13 Ves. 188. "The proposition that the assignees take subject to all the equities under which the bankrupt stood, is unquestionable." Mitford *v.* Mitford, 9 Ves. 100; Pope *v.* Onslow, 2 Vern. 286; Brown *v.* Heathcote, 1 Atk. 160–162; Scott *v.* Surnam, Willes, 402. And cases collected in the reporter's note. Leslie *v.* Guthrie, 1 Bing. N. C. 697; *Ex parte* Newhall, 2 Sto. 360; Fletcher *v.* Morey, id. 555; Mitchell *v.* Winslow, id. 630; Humphreys *v.* Blight's Assignees, 1 Wash. C. C. 44; Stouffer *v.* Coleman, 1 Yeates, 399; In the matter of McLellan, 6 Law Rep. 440; Tallcott *v.* Dudley, 4 Scam. 427. And it seems that the only exception to this rule arises in cases of fraud, which, indeed, forms an exception to every general rule. Story, J., in the cases above cited from 2 Story's Reports, and in 6 Law Rep. 440.

[2] See the cases cited on this point, p. 298, n. 2.

[3] Parker *v.* Manning, 7 T. R. 537; Bedford *v.* Brutton, 1 Bing. N. C. 399.

bringing any suit.[1] And if the promisees of a joint note become several bankrupts, with several assignees, these should join in suing it.[2] If an assignee or assignees die, or are removed, pending any suit which they bring, or which is brought against them, the action survives or continues over until the substituted assignee takes the place of the original.[3] It is said that, if the cause of action arise before the bankruptcy, the assignee may sue, but must declare as assignee; but if it arises after the bankruptcy, he may not only sue in his own name, but in his own right, and need not describe himself as assignee.[4] So, it is said

[1] A leading case upon this point is Snellgrove *v.* Hunt, 1 Chit. 71. The case was an action of *assumpsit* on a bill of exchange drawn on the 16th of January, 1818, payable four months after date, for £100, to the order of ——, the bankrupt, and accepted by the defendant. The declaration alleged the promises to be made to the assignees of the bankrupt. It appeared at a previous trial, that, after the commission issued against the bankrupt, the bill of exchange in question became due; that there were three assignees appointed under the commission, two only of which joined in the present action. It was argued at length by F. Pollock. But *Bayley*, J., said: "The declaration in this case is founded entirely upon the promises to the assignees, and, therefore, they ought all to join." And *Holroyd*, J.: "In the case of bonds and deeds, it has been held that the obligees or covenantees. if alive, ought to join in the action, and if dead, that fact should be averred in the declaration." And to the same point is Bloxam *v.* Hubbard, 5 East, 407.

[2] But in such case, the declaration must set forth in what capacity each sues, and the assignees ought to state their several and respective interests in the declaration. Snellgrove *v.* Hunt, above cited.

[3] Bloxham *v.* Hubbard, 5 East, 407. And it is said that, in case of the removal of an assignee, whether he was plaintiff of record in an action relating to the estate or not, the action may be continued in his name by his successor. Page *v.* Baner, 4 B. & Ald. 345. And if an assignee die, before the collection of the debts due the bankrupt, it is said that the executor of the assignee may sue for a debt due the bankrupt. Richards *v.* The Maryland Insurance Co. 8 Cranch, 84. But see Hall *v.* Cushing, 8 Mass. 521, where it was held that an action against the assignee of a bankrupt does not survive against the administrator of such assignee. And if the assignee of a bankrupt himself become a bankrupt, and make an assignment as such, neither his assignees, nor his personal representatives, are entitled to a debt outstanding, due the bankrupt, but it must go to a new assignee of the original bankrupt. Merrick's Estate, 5 Watts & S. 9.

[4] The case of Evans *v.* Mann, Cowp. 569, is decisive in recognizing this distinction, and has never, as we are aware, been doubted. The facts were briefly, that the bankrupt, after his bankruptcy, and before he had obtained his certificate, carried on his trade as a lighterman, and both built and sold lighters. He sold one to the defendant, who paid him part of the purchase-money; after which the assignees apply to the defendant for the value of the lighter; and so far affirm the contract as to enter into an agreement, by which they are content to be paid the residue of the purchase-money, after deducting what the bankrupt had received; and for this residue, they have brought the action. The objection to the form of the action was, that the plaintiffs, being assignees under a commission, did not state themselves to be assignees in the declaration. Lord *Mansfield* said: "On consideration, there seems to be this distinction: if the assignees bring an action on a contract made by the bankrupt, before his bankruptcy, they must state themselves in the declaration to be assignees. But here, the contract was after bankruptcy, when the bankrupt could have no property of his own. The lighter was the property of the assignees; and, consequently, the sale by him was a contract as their agent, by operation of law, and on their account. Therefore, it was not necessary that they should state themselves to be assignees in the declaration; though, in respect of the evidence in support of the action, it might be incumbent on them to prove the trading, bankruptcy, &c., in short, the whole case." Kiggil *v.* Player, 1 Salk. 111, and cases cited to this point. Thomas *v.* Rideing, Wightwick, 65.

that, if one partner of a firm becomes insolvent, the assignee should join with the remaining partners in an action for a partnership debt.[1]

SECTION VIII.

WHAT PROPERTY THE ASSIGNEE TAKES.

It has been already intimated, that what the bankrupt holds in the right of another, does not pass to the assignee.[2] If, therefore, the bankrupt has collected a debt for another, and has kept the sum so collected apart, it belongs, generally speaking, to him for whom it was collected. But if it is merged indistinguishably into the general assets of the bankrupt, the owner has only a claim for it to be proved like other debts. So, if the bankrupt sold goods for his principal, and they are not paid for, the principal can collect the debt, and sue in his own name. Or, if the bankrupt has received payment of the goods, and has kept that payment apart, the owner, generally, could reclaim it; but not if it were merged in, and mingled with, his assets.[3]

[1] Thomason *v.* Frere, 10 East, 418.

[2] Carpenter *v.* Marnell, 3 B & P. 40; Copeman *v.* Gallant, 1 P. Wms. 314; *Ex parte* Gillett; *Ex parte* Bacon, 3 Mad. 28; Joy *v.* Campbell, 1 Sch. & Lef. 328; Winch *v.* Keely, 1 T. R. 619; *Ex parte* Martin, 19 Ves. 491; Gardner *v.* Rowe, 2 Sim. & Stu. 346; *Ex parte* Chion, 3 P. Wms. 187, n. (a.)

[3] As to goods, or even moneys collected by a factor, if they can be distinguished, Godfrey *v.* Furzo, 3 P. Wms. 185; Rowton, *ex parte*, 17 Ves. 426; Sollers, *ex parte*, 18 Ves. 229. In Willes, 400, Scott *v.* Surman, it was held, recognizing the doctrine of the text, that, if goods be consigned to a factor for sale, and he sell and receive the money before his bankruptcy, and do not purchase with it any specific thing, capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from the assignees, but must come in under the commission. But that, if the goods remain, in specie, in the factor's hands at the time of the bankruptcy, the consignors may recover the goods in trover from the assignees. Or, if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received. The court, with regard to the particular facts before them, held that the money, which had been received by the factor in payment of goods sold, could not be recovered in full, because here, it could not be distinguished from other money of the bankrupt factor. "Money has no earmark, and therefore cannot be followed." Willes, C. J., in this case. But in the modern practice of factors, when money is deposited to the particular account of each consignor, it is conceived that such money may well be held to possess an earmark. And to the same point are, Burdett *v.* Willett, 2 Vern. 638; Tooke *v.* Hollingworth, 5 T. R. 215. Lord *Kenyon*, C J.: "If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the rest of his property, the principal may recover the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankruptcy; nay, if the goods be sold and reduced to money, provided that money be in separate bags, and distinguishable from the factor's other property, the law is the same." Price *v.* Ralston, 2 Dall. 60; Taylor *v.* Plumer, 3 M. & S. 562;

The insolvent laws generally exempt from their operation the same or similar property with that excepted by statute from attachment or levy.[1] Among these, is wearing apparel; but under this clause in the national act, it was held that articles of jewelry, belonging to the bankrupt, passed to his assignee.[2] In New York, however, it was held that jewelry and ornaments which belonged to the wife before marriage, or were given to her afterwards, — even if given by the husband, provided he was not then insolvent, and gave the articles in good faith, — belonged to the wife, and not to the assignee.[3] In a case which occurred in Boston, Judge Story differed somewhat from Judge Betts, applying the principles of equity and trust to the question, and allowing to the wife only such things as the husband must be regarded as holding in trust for her. So as to gifts to the children of an insolvent; if made by himself, and in good faith, before insolvency, we know no reason why they should not remain the property of the children. If given by a stranger, there could be no doubt.[4]

Denston *v.* Perkins, 2 Pick. 86; Chesterfield Manuf. Co. *v.* Dehon, 5 Pick. 7; Scrimshire *v.* Alderton, 2 Strange, 1182. So, in the case of an executor. Howard *v.* Jemmet, (note,) 3 Burr. 1369. Lord Mansfield said: "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself." *Ex parte* Chion, cited *supra*. And where the bankrupt's wife is an executor, the property shall be preserved entire to the testator's representatives. Viner *v.* Cadell, 3 Esp. 88.

[1] The late bankrupt law of the United States excepted from its provisions the necessary household and kitchen furniture of the bankrupt, and such other articles and necessaries as the assignee might designate and set apart, having reference in the amount, to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and also the wearing apparel of the bankrupt, and that of his wife and children.

[2] In the matter of Kasson, 4 Law Rep. 489; In the matter of Grant, 5 Law Rep. 11.

[3] Betts, J., in the matter of Kasson, 4 L. R. 489.

[4] The doctrine of the text is clearly and ably stated by Judge Story, in the matter of Grant, 5 Law Rep. 11, and 2 Story, 312. The facts stated in the petition, so far as material to this point, were, that the wife of the petitioner was possessed of a watch of about the value of fifty dollars, presented to her by the petitioner, about ten years before the filing of the petition; that she had likewise several mourning rings and pins, and a few other articles of jewelry, of the value of about twenty-five dollars, some of which had been given her by friends, and others by the petitioner, some years previous, and one mourning ring, of the value of about five dollars, given her by the petitioner nearly two years before filing the petition. The petition further stated that his two sons, of the respective ages of seventeen and twenty years, had each a gold watch, of the value of about fifty dollars, which had been purchased about two years before with money given by a friend, and with about twenty-eight dollars given to each by the petitioner, out of his private cash. The watch of the wife, and any jewelry given to her by third persons before the marriage, or by her husband, either before or since the marriage, pass to the assignee as part of the property of the bankrupt, to which his creditors are entitled. But jewelry, given by third persons to the wife since her marriage, as personal ornaments, and mourning rings, given to her by third persons since the marriage,

A gift is not complete and effectual until there has been an assent to it on the part of the donee;[1] and the same rule is generally applicable to a devisee. But where one devises real estate to a bankrupt, he was not permitted to decline it; and the true reason is, that the assignee had become possessed of his right of acceptance.[2]

After the party is decreed to be a bankrupt, it would seem that whatever comes to the bankrupt remains his own property.[3] If the title, by devise or otherwise, falls upon him after the petition and before the decree, it goes to the assignee, as much as if it fell before the petition.[4] But the insolvent laws do not contain

as personal memorials, belong to the wife for her sole and separate use in equity, and do not pass to the assignee under the bankruptcy for the benefit of the creditors. That the watches of the sons, under the circumstances stated in the petition, belong to them, as their property. But, nevertheless, if the petitioner was insolvent when he applied a part of his own money to purchase the same for his sons, he had no right so to do against the claims of the creditors; and that in equity, therefore, if the petitioner was so insolvent, the sons must account to the assignee for the amount of the money of the petitioner, so paid towards the purchase of the watches. But if the petitioner was not then insolvent, and the donation on his part was made *bonâ fide*, and the donation was suitable to his rank in life, condition, and estate, then it was good, and not within the reach of the creditors, or in fraud of their rights under the bankruptcy.

[1] 2 Kent's Commentaries, 438.

[2] The doctrine with regard to a devise is, that the devisee must consent, otherwise the title does not vest in him. But when the estate is devised absolutely and without any trust or incumbrances, the law will presume it to be accepted by the devisee, because it is for his benefit; and some solemn, notorious act is required to establish his disclaimer of it. Townson *v.* Tickell, 3 B. & Ald 31; Doe *v.* Smyth, 6 B. & C. 112; Brown *v.* Wood, 17 Mass. 68; Ward *v.* Fuller, 15 Pick. 185. And it will be considered for the benefit of the bankrupt, that his creditors should have all the property of which he has the right of ownership. For in *Ex parte* Fuller, 5 Law Reporter, 213, and 2 Story, 327, S. C., *Story*, J., said: "It has been suggested, that the devise was not beneficial to Ross, (the bankrupt,) and therefore no presumption can arise of his acceptance of it. How that can be well made out, I do not perceive. Before his bankruptcy, it was clearly for his benefit; and that event has not changed the nature of the interest, but merely the mode of appropriating it. His own voluntary act has enabled his creditors to have the benefit of it. As an honest debtor, he must desire that his creditors should derive as much benefit from all his 'rights of property,' as is possible. It would be a fraud on his part to withdraw any fund from their reach by a disclaimer or renunciation; and it ought to deprive him of a certificate of discharge. It is, therefore, clearly now for his benefit to presume his acceptance of the devise; rather than to presume him willing to aid in the perpetration of a fraud."

[3] Owen on Bankruptcy, 124; Story, J., in the matter of Grant, 2 Story, 312; Webb *v.* Fox, 7 T. R. 391.

[4] *Ex parte* Newhall, 2 Story, 360. "The third section of the bankrupt act of 1841, chapter 9, declares, that all property and rights of property of every bankrupt, who shall, by a decree of the proper court, be declared a bankrupt within the act, shall by the mere operation of law, *ipso facto*, from the time of such decree, be deemed to be devested out of the bankrupt, and the same shall be vested by force of the same decree in such assignee, as from time to time shall be appointed by the proper court for this purpose. It seems to me that the natural, and even necessary interpretation of this clause is, that all the property and rights of property of the bankrupt, at the time of the decree, are intended to be passed to the assignee. It is true, that the decree will also by relation cover all the property which he had at the time of filing the petition, and at all intermediate times, to effect the manifest purposes of the act. But this is

the same provisions as to decree, &c.; and it is probable that the time when the insolvent shall begin to hold as his own what comes to him, will generally be determined by the phraseology of each statute, or the practice under it.

If one partner of a firm becomes insolvent, this operates a dissolution of the partnership; and his assignee takes only his interest in the balance remaining after the debts are paid.[1] To ascertain this, it is the common practice to permit the assets to remain in the hands of the other partners for them to settle the affairs of the firm and render an account. But there is nothing to prevent an appraisement or agreement as to the value of the insolvent's interest, and a transfer of that for its value to the other partners. But such an arrangement should not be made without the sanction of the court.[2] And of course it would not be binding in favor of the other partners, if it were made fraudulently, with their connivance or knowledge or reasonable means of knowledge. The assignee of the insolvent partner is said to be a tenant in common with the other partners; so that neither can take the property from the hands of the other. But the solvent partners must have a right to hold the property needed to settle the concern.

Where, after the petition, property fell to the wife of the bankrupt, in such way as to give him the right of possessing it, in the final decree the "equity" of the wife's interest was regarded,

rather a conclusion, deducible from the general provisions and objects of the whole act, than a positive provision. It results by necessary implication in order to effectuate the obvious purposes of the act, and to prevent what otherwise would or might be irremediable mischiefs."

[1] Parker *et al. v.* Muggridge *et al.* 2 Story, 346. "The general rule in bankruptcy is, that in cases of partnership, where one party becomes bankrupt, his assignee can take only that portion of the partnership assets which would belong to the bankrupt, after payment of all the partnership debts; and that the solvent partners have a lien upon the partnership assets for all the partnership debts, and also for their own shares thereof, before the separate creditors of the bankrupt partner can come in and take any thing. It is true that, in such cases, it may often from the necessity of the case, and for the purpose of ascertaining the partnership assets and debts, and adjusting and settling the same, and making a final settlement and distribution of the surplus, be indispensable, that the district court, as a court of equity, should take into its own hands the exclusive management and administration of all the partnership assets, and inhibit the other partners from intermeddling therewith. But this it will do with caution, and solely for the purposes before stated. And so far from thereby displacing any of the rights, liens, and equities of the other partners, it studiously seeks to maintain and protect them." The learned opinion of *Ware*, J., in Ayer *v.* Brastow, in the District Court of Maine, reported 5 Law Rep. 498.

[2] See, for illustrations of this doctrine, the cases above cited, and a leading case in America, Tallcott *v.* Dudley, 4 Scam. 427, where this subject of insolvent partners is examined with great ability. Smith *v.* Oriell, 1 East, 368; Smith *v.* Stokes, 1 East, 363. And the remaining partners, in adjusting the accounts of the firm after the disso-

and reasonable provision for her support was made out of this property.[1]

An assignment in insolvency passes the money of the insolvent in the hands of an attorney who has collected it for him.[2]

It passes the possibility of estate or title, when that is connected with an interest; as, for example, a contingent remainder; but not a naked possibility, as that of an heir.[3]

lution, may reimburse themselves for sums which the bankrupt has abstracted. 2 Eq. Cas. Abr. 110; Richardson *v.* Gooding, 2 Vern. 293. And if after the bankruptcy of one partner, the others carry on the business with the partnership funds, the assignee of the bankrupt is entitled to a share of the profits. Crawshay *v.* Collins, 1 Jac. & W. 267; 15 Ves. 218.

[1] Shaw *v.* Mitchell, 5 Law Rep. 453. *Ware*, J., said in this case: "Whenever the husband is obliged to seek the aid of a court of equity to obtain possession of the wife's property, the court will give its aid only on condition that the husband settle part of the property on the wife, to be held for her benefit independent of the husband and his creditors. This right of the wife to a reasonable provision out of her own property for the support of herself and her children, is called the wife's equity. The general principle on which the court interpose in her favor, is said to be that he who seeks equity shall do equity; and the present disposition of courts seems to be rather to enlarge than curtail the beneficial operation of the rule in favor of married women. This is the established rule in all cases where the husband himself, or his general assignee for the payment of debts, or under insolvent laws, or in bankruptcy, is obliged to have recourse to a court of equity to obtain possession of the wife's personal property." This case appears to me to fall within the general principles on which this jurisdiction is exercised by courts of equity. And as this court, sitting in bankruptcy, has all the powers of a court of general equity jurisdiction, it has the authority to allow the claim of the petitioner. If it would be allowed against the husband, it will be equally so against his assignee. An assignment by operation of law in bankruptcy passes the property in the same plight and condition as it was possessed by the bankrupt himself, and subject to all the equities that affected it in his hands."

[2] And, in general, any property of the bankrupt which was in the hands of another at the time of the decree in bankruptcy, vests in his assignee, subject to any lien or claim its holders may have upon it. See cases cited on the matter of lien, p. 295, n. 4.

[3] It seems that the test, by which to decide whether property of this general character passes by the decree in bankruptcy is, whether the right is such that the bankrupt himself could have assigned it. Higden *v.* Williamson, 3 P. Wms. 131; Moth *v.* Frome, Ambler, 394; Dommett *v.* Bedford, 6 T. R. 684; under this rule, a patent-right will pass. Hesse *v.* Stevenson, 3 B. & P. 565. Lord *Alvanley*, C. J., delivering the opinion of the court said, (p. 577): "It is contended that the nature of the property in this patent was such that it did not pass under the assignment; and several cases were cited in support of this proposition. It is said that although by the assignment every right and interest, and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignees, yet that the fruits of a man's own invention do not pass. It is true that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass, nor could the assignees require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest shall not pass in the same manner as any other property acquired by his personal industry. Can there be any doubt, that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? They cannot indeed take the profits of his daily labor. He must live. But if he accumulate any large sum, it cannot be denied that the assignees are at liberty to demand it; though until they do so, it does not lie in the mouth of strangers to defeat an action at his suit in respect of such property by setting up his bankruptcy.

So it cancels and revokes any attorney's lien or authority given by the insolvent; but not if it be coupled with an interest. The distinction here would doubtless be much the same as between those powers which are withdrawn by death, and those which are not. But when an authority is withdrawn by the death of the principal, it is because it can only be executed in his name; but the legal representatives must execute it for the benefit of the former attorney; and in such cases, the insolvency would not revoke the authority.

Where there is no insolvent law, there is nothing to prevent a debtor from making a voluntary assignment of his property, in trust for his creditors; and to assign so much only as he pleases, and favor one creditor, or one class of creditors, at his own choice, and generally to constitute the trust upon terms as he prefers.[1] The mischiefs resulting from this state of things, led as we have said, to the general introduction of insolvent laws.[2] But they do not exist in all the States; and where they do not, the same questions, and the same diversity of decision may be expected which led to their adoption elsewhere. Thus, in some States, no assignment enured to the benefit of creditors who did not become parties to it; in others, their assent was presumed on the ground that it was for their benefit. And, generally, an assignment which provided for the absolute discharge of the assignor, was construed with much more strictness than one which provided only for the distribution of the property.[3]

SECTION IX.

OF THE DISCHARGE OF THE INSOLVENT.

Among the insolvent laws of the several States there is a great diversity in the kind and extent of relief or benefit which they give to the insolvent. In some, only his present assets are distributed, leaving future acquisitions liable to attachment. In

We are therefore clearly of opinion, that the interest in the letters-patent was an interest of such a nature as to be the subject of assignment by the commissioners." So an interest in a policy of insurance. Schondler *v.* Wace, 1 Campb. 487.

[1] See *supra*, and cases cited on the subject of preference of creditors at the common law, p. 276, n. 1.

[2] 2 Kent's Commentaries, 394.

[3] 16 Pick. 25; id. 36. The cases which illustrate this doctrine are fully cited, *supra*, in the notes upon the subject of preference of creditors at the common law, p. 276, n. 1.

some, the insolvent is discharged and protected from arrest or imprisonment. In some, the debtor is discharged if so voted by a certain proportion of his creditors. In some, the debtor is discharged if so voted, or without or against the will of his creditors, provided his assets pay a certain per centage of his debt. The principal provisions of this sort we state in our notes.[1]

If a bankrupt or insolvent, who can be discharged only by the assent or vote of his creditors, gives money to any one or more, to obtain their assent, his discharge is void; and the assignees can recover the money from the creditor. And if he gives the creditor a bond, note, or promise, for the same purpose, it is void.[2]

[1] The persons who are entitled to relief under the insolvent laws differ in the different States. In California, Michigan, Ohio, Indiana, Louisiana, Missouri, Connecticut, New York, Massachusetts, Arkansas, and Rhode Island, any debtor, whether in or out of prison, may have the benefit of the insolvent laws. Laws of Cal., 1850–53, ch. 80; Rev. Stat. of Mich., 1837, title 7, ch. 3; Stats. of Conn., 1838, p. 270; Rev. Stat. of Ohio, 1854, ch. 57; Rev. Stat. of Arkansas, 1837; 2 Kent's Com. 394. In Delaware, Maryland, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Illinois, and New Jersey, persons only are entitled to relief who are imprisoned on mesne or final process. See the Statutes and Codes of these States. But in Maine, New Hampshire, Kentucky, and Virginia, the relief is confined to debtors charged in execution. In Vermont, the only law resembling an insolvent act is one of the Legislature of 1855, forbidding voluntary assignments with a preference; but there is a constitutional provision that the debtor shall not be continued in prison where there is not a strong presumption of fraud after delivering up and assigning, *bonâ fide*, all his estate for the use of his creditors. The provisions relating to the effect of the discharge vary, also, in different States. The Statutes of Arkansas, New Jersey, North Carolina, Mississippi, Tennessee, Illinois, Georgia, Missouri, Connecticut, Pennsylvania, and Ohio, exempt only the person of the debtor from imprisonment. Stat. of N. J., 1847, tit. 9, ch. 4; Rev. Stat. of Arkansas, 1837; Stat. of Conn. 1838, p. 270; Ohio Rev. Stat.; Code of North Carolina; Statute Laws of Tennessee. The Statutes of California, Michigan, and Massachusetts provide for the discharge of the insolvent from liability for the debt itself, if his property be assigned and distributed among his creditors. Laws of Cal., 1850–53, ch. 80; Rev. Stat. of Michigan, 1837, tit. 7, ch. 3; Massachusetts Insolvent Laws of 1838. The laws of New York upon this subject differ in important respects from those of many of the States. We give a few of its provisions, as abridged from the statutes by Chancellor Kent. "The insolvent laws of New York enable the debtor, with the assent of two thirds in value of his creditors, and on the due disclosure and surrender of his property, to be discharged from all his debts contracted within the State, subsequently to the passing of the insolvent act, and due at the time of the assignment of his property, or contracted before that time, though payable afterwards. The creditor who raises objections to the insolvent's discharge, is entitled to have his allegations heard and determined by a jury. The insolvent is deprived of the benefit of a discharge, if, knowing of his insolvency, or in contemplation of it, he has made any assignment, sale, or transfer, either absolute or conditional, of any part of his estate, or has confessed judgment, or given any security with a view to give a preference for an antecedent debt to any creditor. The discharge applies to all debts founded upon contracts made within the State, or to be executed within it; and for debts due to persons resident within the State at the time of the publication of notice of the application for a discharge, or to persons not residing within the State, but who united in the petition for his discharge, or who accept a dividend from his estate."

[2] Sumner *v.* Brady, 1 H. Bl. 647; Thomas *v.* Rhodes, 3 Taunt. 478; Archbold's Bankrupt Law, 201; Birch *v.* Jervis, 3 C. & P. 379. Lord *Tenterden*, in the last case said: "A bill given to a creditor, to induce him to sign the certificate of a bankrupt,

No certificate of discharge affects the claims of creditors upon co-debtors or sureties. Nor does it reach the liability of the insolvent for torts; — as slander, trespass, or the like; nor for trespass for mesne profits; nor for fiduciary debts, which were not proved before the assignee; nor, generally, for any debts not provable.[1]

SECTION X.

OF FOREIGN BANKRUPTCY OR INSOLVENCY.

The effect of proceedings in bankruptcy in a foreign State has been much discussed and variously determined. The principal question may be stated thus: Let us suppose that an English

is void, in whosesoever hands it may be, and whatever the consideration given by the holder." Smith *v.* Bromley, cited in Jones *v.* Barkley, Doug. 696; Robson *v.* Calze, Doug. 230. Even if the money is not given by the bankrupt, or with his privity, the discharge is void. *Ex parte* Butt, 10 Ves. 359; *Ex parte* Hall, 17 Ves. 62; Holland *v.* Palmer, 1 B. & P. 95.

[1] On the subject of co-debtors and sureties, see Morse *v.* Hovey, 1 Sandf. Ch. 187; Selfridge *v.* Gill, 4 Mass. 96; Taylor *v.* Mills, Cowp. 525; Paul *v.* Jones, 1 T. R. 599; Utterson *v.* Vernon, 4 ib. 570; Owen on Bankruptcy, 180; Wells *v.* Mace, 17 Vt. 503. Torts — Shoemaker *v.* Keeley, 1 Yeates, 245; 2 Dall. 213, S. C. The leading case of Parker *v.* Norton, 6 T. R. 695, where the doctrine of the text is laid down by the four judges of the King's Bench. Parker *v.* Crole, 5 Bing. 63; unless the judgment has been obtained prior to the issuing of the decree in bankruptcy. 17 Vt. 512; Comstock *v.* Grout. Trespass for Mesne Profits — Goodtitle *v.* North, Doug. 584. Lord *Mansfield:* "The *form* of the action is decisive. The plaintiff goes for the whole damage occasioned by the tort, and when damages are uncertain, they cannot be proved under a commission of bankruptcy." But where the damages have been liquidated, as in the case of an action of trespass for mesne profits, after a recovery in ejectment, judgment having been given for costs, it was held that this was a debt provable under the commission. Gulliver *v.* Drinkwater, 2 T. R. 261. Fiduciary Debts — 5 Law Reporter, 258. In the matter of Brown, ib. 259. In the matter of Tebbets. The opinion of Mr. Justice Story in this case is referred to as the best discussion we have met with, of this subject. He comes to the conclusion, 1st. That fiduciary debts are provable under the proceedings in bankruptcy equally with other debts, at the creditor's election. 2d. That if the fiduciary creditor elects to come and prove his debt and take a dividend, he is barred of all other remedy therefor, except out of the assets. In 7 Met. 424, Fisher *v.* Currier, it is said: "We consider it as now settled that creditors having fiduciary debts, are not bound to come in under the commission, and without their own consent are not bound by the discharge, but that they may come in and prove, and receive a dividend, if they choose, and if they do they are barred by the discharge. Chapman *v.* Forsyth, 2 How. U. S. 202; Moore *v.* City of Lowell, 7 Met. 152. A conflict of opinion occurred in the courts of the United States, as to the effect of the existence of fiduciary debts upon the decree in bankruptcy. In Virginia, it was held by Mr. Justice Daniel that a person who owes fiduciary debts is not entitled to the benefit of the bankrupt act, and is not within the scope of its provisions, and cannot be declared a bankrupt as long as he remains in that condition. In the matter of Hardison, 5 Law R. 255. In Ohio, it was held by Mr. Justice McLean, that no relief can, under the bankrupt act, be given against a fiduciary debt. But that the debt in that case, having been contracted before the passage of the bankrupt act, the applicant was not thereby deprived of the benefit of the act as to other debts. In the matter of Low, 5 Law R. 258. In the matter of Brown, above cited, Mr. Justice Thompson took a middle ground, which was confirmed by Judge Story in the conclusions he arrived at, in the matter of Tebbets, *supra.*

merchant, resident in England, becomes a bankrupt there; that he has also creditors in New York, and property there; and that after the proceedings in England, which certainly vest in his assignees all his property in that country, his creditors in this country attach his property in New York. Can the assignee in England set aside the attachment in New York on the ground that the property in New York had passed to the assignee by force of the proceedings in England before the attachment?

After some fluctuation, the courts in England have settled down upon the rule that the proceedings in bankruptcy in the country of the bankrupt's residence, operate upon his assets all over the world. And in France and Holland, and, indeed, among the commercial States of Europe generally, the same rule prevails. It is based upon two principles. One is, that the system of bankrupt law should not be considered as local, but as universal, and that all the various parts of this system in different States should recognize each other, and by their union form a branch of the *jus gentium*, of what may be called the private law of nations. Another is, that the bankrupt law, when it sequesters the property of the bankrupt, and passes it over to his assignee, operates precisely like a grant, or sale, or other transfer of the bankrupt himself, and should be regarded as his own act, done by him, under compulsion of law.[1]

[1] A leading case in England upon this subject, is that of Sill *v.* Worswick, 1 H. Bl. 665. The question considered by the court, without going into the details of the case, was simply whether an assignment in bankruptcy in England carried with it money of the bankrupt in the Island of St. Christopher, where the laws of England have no binding force. The authorities were examined at great length in the argument, and by the judge who gave the opinion of the court. And Lord *Loughborough* said: "It is a clear proposition not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." . . . . . "Personal property thus being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, — not as a forfeiture, not on a supposition of a crime committed, not as a penalty, — and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well-regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of Solomons *v.* Ross, and Jollett *v.* Depontbieu, where the laws of Holland, having, in like manner, as a commission of bankruptcy here, taken the administration of

In this country, in the earliest cases, it would seem that our courts were disposed to adopt the English rule.[1] But this tendency soon disappeared; and although to this day, wise men doubt whether the English rule is not the most reasonable and just, it seems to be admitted that the American rule is the very opposite of the English.[2]

the property, and vested it in persons who are called Curators of Desolate Estates, the Court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts. In those cases the Court of Chancery felt very strongly the principle which I have stated, that it has had a very universal observance among all nations." The decisive character of the English authorities on this point render a minute examination of them in this note unnecessary. The doctrine of the text will be found to be sustained in the following cases. In *re* Wilson, cited, 1 H. Bl. 691–692; Solomons *v.* Ross, 131, ib. *note;* Jollett *v.* Dupontbieu, id. 132, *note;* Neal *v.* Cottingham, ib.; *Ex parte* Blakes, 1 Cox, 398; Hunter *v.* Potts, 4 T. R. 182; Smith *v.* Buchanan, 1 East, 6; Potter *v.* Brown, 5 East, 124–131; Wadham *v.* Marlow, cited, 1 H. Bl. 437–8–9, *n.*; S. C. 8 East, 314–16. *note* z.; Pipon *v.* Pipon, Amb. 25, relied upon by Chancellor *Kent* in the opinion in Holmes *v.* Remsen, 4 Johns. Ch. 460, where the English doctrine is stated to be settled. The important case of the Royal Bank of Scotland, &c. *v.* Cuthbert, (usually cited as Stein's case.) 1 Rose's Cases in Bankruptcy, 462; Selkrig *v.* Davis, 2 Rose, 291; S. C. 2 Dow, 230; and see *Ex parte* D'Obree, 8 Ves. 82; Quelin *v.* Morisson, 1 Knapp, 265. On the doctrine of the law of France and Holland, see Story on the Conflict of Laws, § 417, and citations from the Continental authorities. — Henry on Foreign Law, (Judgment of the Court of Demarara and Essequibo, on the plea of the English certificate of Bankruptcy in bar, in the case of L. X. Wm. Odwin *v.* John Forbes, p. 127 to 135, and *passim*, and citations there made from the Roman law and the later Continental jurists. In this valuable paper. the English as well as Continental authorities are reviewed with marked learning and ability.

[1] The leading case in America which adopts the English doctrine, is that of Holmes *v.* Remsen, 4 Johns. Ch. 460, which was decided by Mr. Chancellor Kent in one of his most elaborate and learned opinions. In it he reviews and comments upon all the English cases upon the subject, and examines the European authorities at length, and gives judgment in accordance with their doctrine. The case is referred to as throwing great light upon the whole subject of the Conflict of Laws, in this matter. Nor is the value of the case as an examination of authority diminished from the fact that its doctrines have been adopted by very few of the courts of the country. The court of New York in Bird *v.* Pierpont, 1 Johns. 118, per *Livingston*, J., seems to have adopted a similar view. And in Bird *v.* Caritat, 2 Johns. 342; Goodwin *v.* Jones, 3 Mass. 517. And a similar doctrine, but with limitation, is laid down in Ingraham *v.* Geyer, 13 Mass. 146. These are the only American cases we have met with which give countenance to the view adopted by the uniform current of English authority for nearly a century.

[2] The case of Blake *v.* Williams, 6 Pick. 286, has been said to be the leading case in America, adopting the view now generally held in this country. The opinion of the court was delivered by *Parker*, C. J., the authorities reviewed, and the English doctrine rejected. The following cases adopt the American view: Ingraham *v.* Geyer, 13 Mass. 146; Estate of Merrick, 2 Ashm. 485, S. C. 5 Watts & S. 9; Blane *v.* Drummond, 1 Brock. 62; Dawes *v.* Boylston, 9 Mass. 337; Orr *v.* Amory, 11 Mass. 25; Milne *v.* Moreton, 6 Binn. 353; Saunders *v.* Williams, 5 N. H. 213; Holmes *v.* Remsen, 20 Johns. 229; *Marshall*, C. J., in Harrison *v.* Sterry, 5 Cranch, 289; Harrison *v.* Sterry, Bee, 244. The leading case on the subject of insolvent laws as affecting the rights of citizens of different States: 12 Wheat. 213, and *passim;* Plestoro *v.* Abraham, 1 Paige, 236; Fox *v.* Adams, 5 Greenl. 245; Burk *v.* M'Clain, 1 H. & McH. 236; Wallace *v.* Patterson, 2 id. 463; McNeil *v.* Colquhoon, 2 Hayw. 24; Robinson *v.* Crowder, 4 M'Cord. 519. The learned opinion of *Ware*, J., in the case of The Watchman, Ware, 232; Very *v.* McHenry, 29 Maine, 206; Johnson *v* Hunt, 23 Wend. 87, where the doctrine of the text is set forth at length; Taylor *v.* Geary, Kirby, 313; Greene *v.* Mowry, 2 Bailey, 163. In this case, a distinction was made, like that recog-

We hold in this country, that the bankrupt and insolvent law form a part of the law of nations in no sense and in no respect; that they not only derive all their force from the authority of the State which enacts them, but have no force whatever — no more than any other local and municipal law — beyond the limits of that sovereignty.[1]

So too, our courts hold, that the cession of the bankrupt's assets to his assignee, is not to be regarded as his own act; but rather as the result and effect of his civil death. He has, as a merchant, ceased to be. He has no longer any thing to do with his property; and does not possess, and cannot exercise any more right or power in respect to it than a mere stranger.[2] And the principle on which his assets are to be gathered and distributed, is the same which would be applied if he had died insolvent, and an administrator, instead of an assignee, had possession of his property. Hence it follows that within the State where insolvency goes into effect, it operates on all the property, in the same way that insolvency declared by probate would operate on the effects of a dead man; that is, only within the State where it occurs; leaving creditors under other jurisdictions to get hold of other assets if they can.[3]

nized in the text, between a voluntary assignment, and one under the bankrupt laws; and see Bholen *v.* Cleveland, 5 Mason, 174. See two cases in New Hampshire, decided with reference to the insolvent law of Massachusetts, which seem, to an extent, to be at variance with the general current of American authority. Hall *v.* Boardman, 14 N. H. 38; Hoag *v.* Hunt, 1 Fost. 106.

[1] In the cases cited in the preceding note, Saunders *v.* Williams, 5 N. H. 215, *Richardson*, C. J., said: "The rule, which must give effect here to a bankrupt law of a foreign country, is a mere rule of amity, and not of international law; and in the present circumstances of this country, it is thought that no rule of amity can require us to give effect to a foreign law of bankruptcy here, in such a manner as to deprive our own citizens of the remedy which our own laws give them against the property of their foreign debtors, which may be found in this country."

[2] In 6 Binn. 369, Milne *v.* Moreton, *Tilghman*, C. J., said: "It was remarked during the argument, that no good reason can be assigned why an assignment by the bankrupt himself should prevail, and not the present one as made by the commissioners, which ought to be considered as equivalent thereto, and be deemed a voluntary conveyance made by the bankrupt himself, for a valuable consideration; the difference appears to me sufficiently obvious. Effect is given to the fair assignment of the bankrupt himself, because it is the spontaneous act of the party having the full dominion over the property, transferring an equitable, if not a legal title thereto, after which his interest therein necessarily ceases, and is no longer subject to an attachment. It is wholly superfluous to cite Justinian, lib. 2, tit. 1, § 40, to show that nothing is more conformable to natural equity than to confirm the will of him who is desirous to transfer his property to another. But effect cannot be given to the assignment by the commissioners, unless we adopt the British Statutes of Bankruptcy as laws binding on ourselves, although they were not considered to effect us when we were the colonies of Great Britain; and this too, when their operation would manifestly interfere with the interests of our own citizens."

[3] The cases above cited, and in Holmes *v.* Remsen, 20 Johns. 265, the court say:

With this exception, however, which is universally admitted. An English assignment under the bankrupt law would not defeat the attempt of a creditor in New York to get hold of the property of the bankrupt that was there; but after the New York debts and claims are satisfied, the English assignee takes all the residue.[1] It may be added also, that the question and the difference refer to personal goods and chattels only; as real estate has always a place, and is transferable only under the law of that place.[2]

The English courts do not intimate that their bankrupt law can have any force, as law, abroad; or that any foreign law can have that force in England. But they hold that international comity requires that the tribunals in each State shall recognize this law and the proceedings under it, in every other. But in this country, it is held that this would be an unreasonable and excessive stretch of comity; and that it is the duty of our courts to protect our citizens against any interference with their rights or securities of a foreign law, which was made neither by us nor for us.

"It is an established and universal rule that, independent of express municipal law, personal property of foreigners dying testate or intestate, has locality. Administration must be granted, and distribution made, in the country where the property is found; and as to creditors, the *lex rei sitæ* prevails against the law of the domicile, in regard to the rule of preferences. In principle, I can perceive no substantial difference between that case and the present. Why should not a liberal comity, also, demand that the first grant of letters of administration should draw to it the distribution, among creditors, of the whole assets, wherever situated? The plausible reason for the distinction, may be that the interests of commerce require a discrimination in favor of the assignee of bankrupts. But, in practice, I believe it will be found that commerce is equally affected by the rule in both cases; because the rule, in either case, can seldom be applied, except to merchants and traders; and whether administration be committed to the executors or administrators of a dead man, or to the assignees of a bankrupt, is not very important as to the point before us. Anomalies are inconvenient in the law, and should not be allowed without strong reason."

[1] The doctrine of the text is fully recognized in those of the cases above cited when the question was passed upon directly or indirectly. The proposition is laid down in Merrick's Estate, 5 W. & S. 9, and 2 Ashm. 485, that foreign assignees of bankrupts may resort to our courts to recover debts due, or *choses in action* belonging to their bankrupt, where the claims of such assignee do not conflict with those of our citizens. In Plestoro *v.* Abraham, above cited, *Marcy*, J., said: "I do not understand that this comity has anywhere been so far withheld, as to refuse to foreign assignees a resort to our courts in their character as assignees or representatives of the bankrupt, to secure the rights they have acquired by assignment."

[2] Oakley *v.* Bennett, 11 How. U. S. 33–45. Mr. Justice *McLean*, delivering the opinion of the court, said: "But it is an admitted principle in all countries where the common law prevails, whatever views may be entertained in regard to personal property, that real estate can be conveyed only under the territorial law. The rule is laid down clearly and concisely by Sir William *Grant*, in Curtis *v.* Hutton, 14 Ves. 537–541, where he says: 'The validity of every disposition of real estate must depend upon the law of the country where that estate is situated.' The same rule prevails generally in the civil law. . . This doctrine has been uniformly recognized by the courts of the United States, and by the courts of the respective States. The form of conveyance adopted by each State for the transfer of real property, must be observed. This is a regulation which belongs to the local sovereignty."

The English courts, indeed, have recently manifested a purpose — perhaps in consequence of the American decisions — to limit the operation of their rule to the proceedings under bankruptcy in States which admit the same rule. This is perfectly fair, but it tends to reduce this question of comity or justice into one of mere expediency, concerning which the courts and authorities of every country must judge for themselves, on their own facts.

This question is much more important in this country than it is in England, because the numerous States of the Union are, in the absence of a national bankrupt law, foreign to each other, in this respect. And vastly more cases and questions, involving far greater amounts of property, arise under this question between our States, than can come under it in England, in reference to foreign bankrupt laws, or the operation of her own in foreign States.

It is an analogous question, whether a discharge of the debtor under a bankrupt or insolvent law, is a discharge of all his debts everywhere. And it has been decided in a similar way, that is, with a similar difference, in England and in America.[1] Here,

[1] The doctrine of the text is well set forth by *Betts*, J., delivering the opinion of the court, in the matter of Augustus Zarega, 4 Law Reporter, 480: "It appears that some of the creditors of the petitioner reside abroad, and the objection taken by the opposing counsel is, that the discharge of the bankrupt, under the laws of this country, does not discharge him from his creditors residing abroad. The exception is taken under the idea that the debt was contracted in Germany, although I see no evidence before the court to that effect, or anything to show but that the debt was contracted here, in the ordinary course of business transactions, such as an order sent abroad for goods, or the like. It is not essential to ascertain the origin or location of the debt. If, however, the debt was contracted in Germany, it might have an effect on the proceedings, when the final steps are to be taken. The question here is, whether the discharge of a bankrupt under the law of this country, would operate as a bar to the demands of foreign creditors, it being asserted that the United States have no power to destroy contracts entered into without their jurisdiction, and the contract is to be left to the jurisdiction of that country wherein it originated. It is not important, in disposing of this question, to enter into a discussion of the essence of contracts or their obligations, nor to inquire into the effect of a discharge in this country, under the bankrupt law, if set up in a foreign country as a bar to the claims of creditors. In England, as well as in France and Holland, and perhaps throughout Europe generally, the discharge of a bankrupt under the laws of either country, operates in all other places whatsoever. So, a person having been decreed a bankrupt in France, may avail himself of the privileges it confers on him, in any part of England, and plead it with the same effect as in his own country. So, in England, where they set up that claim in behalf of their own bankrupts in foreign countries, they allow the same privileges to others. But in this country we do not recognize such a doctrine. A discharge as a bankrupt in a foreign country is not deemed here as a bar to any action that may be brought. The discharge is considered as local, and although an assignee of an individual, declared a bankrupt in a foreign country, would be allowed to sue as such assignee, yet our courts would not recognize the discharge as a bar to debts contracted in this country, or due to citizens of this country." The doctrine will be found considered in the cases already cited on the subject of assignments. This matter being considered more

however, this very interesting question is affected importantly by the clause in the National Constitution, which prohibits the several States from forming laws which "impair the obligation of contracts," but the questions which have arisen upon this subject are so nice and difficult, and the adjudication in respect to them is so various and irreconcilable, that in an elementary work like the present, it will be impossible to do more than give a very brief statement of what seems to be the result. And even this must be stated with some uncertainty.

The foundation of the whole is a distinction introduced by the Supreme Court of the United States, between the *right* of the creditor, and his *remedy*.[1] Thus, a statute which exempts the person of a debtor from arrest or imprisonment, touches only the remedy, and is constitutional, although applying to previous debts. But if it discharges the debts, or relieves the property from attachment, or prevents a judgment or execution, or operates as a stay law, it affects the *right* of the creditor and the *obligation* of the debtor, and is unconstitutional unless limited to debts subsequently incurred. And if such a statute expresses no distinction of this sort, it shall be held to be intended to apply only to subsequent debts, because it shall be held to be intended to be constitutional rather than otherwise. But if it expressly

minutely in another portion of this work, we cite but a few of the important cases with reference to discharge. Ballantine *v.* Golding, Cooke's Bankrupt Law (8th ed.), p. 487; Potter *v.* Brown, 5 East, 124; Odwin *v.* Forbes, 1 Buck. 57; Edwards *v.* Ronald, 1 Knapp, 266, note; Hunter *v.* Potts, 4 T. R. 182; Armani *v.* Castrique, 13 M. & W. 447. Cases illustrating what is called the American doctrine, Van Raugh *v.* Van Arsdaln, 3 Caines, 154; Smith *v.* Smith, 2 Johns. 235; Proctor *v.* Moore, 1 Mass. 198; Emory *v.* Greenough, 3 Dall. 369; Braynard *v.* Marshall, 8 Pick. 196; Betts *v.* Bagley, 12 Pick. 580; Agnew *v.* Platt, 15 Pick. 417; Savoye *v.* Marsh, 10 Met. 594; Fiske *v.* Foster, id. 597; Larrabee *v.* Talbott, 5 Gill, 437. The opinion of the court of the United States, in the leading case of Ogden *v.* Saunders, 12 Wheat. 213, *et seq.*, where the whole matter of discharge, with reference to the conflict of laws, and especially with regard to the constitutional provision alluded to in the text, is examined. Woodbridge *v.* Allen, 12 Met. 470; M'Millan *v.* M'Neill, 4 Wheat. 209; Tebbetts *v.* Pickering, 5 Cush. 83. The courts of Pennsylvania seem to have adopted, to an extent, the principles of comity which have prevailed in the English courts, and hold that the same effect shall be given to a discharge in insolvency in another State, which that State gives to discharges in the State of Pennsylvania. Smith *v.* Brown, 3 Binn. 201; Boggs *v.* Teackle, 5 Binn. 332; Walsh *v.* Nourse, 5 Binn. 381. But if the debt is both contracted and to be discharged in the foreign State, a discharge there will bind the creditor, even if he be a resident of this country. *Shaw*, C. J., in May *v.* Breed, 7 Cush. 15; Sherrill *v.* Hopkins, 1 Cow. 103. In May *v.* Breed, the numerous cases on this subject are collected on the one side and the other, and reviewed to some extent in the elaborate and learned opinion of Mr. Chief Justice Shaw. S. P. Very *v.* McHenry 29 Me. 206.

[1] Bronson *v.* Kinzie, 1 How. 311; Green *v.* Biddle, 8 Wheaton, 1, 75; McCracken *v.* Hayward, 2 How. 608, 614.

covers all debts, whether subsequent or prior, equally, it is unconstitutional as to all subsequent debts.[1] A State may, however, perhaps, make partial exemptions, as, of apparel, tools, or even of a homestead, to a reasonable extent.[2]

The courts of the United States have held, that no State insolvent law or process can discharge the debts of the citizens of that State, as against the citizens of another State, unless they choose to come into the assignment.[3] This, most of the state courts, if not all, deny. And therefore a citizen, of New York, for example, whose Boston debtor has become insolvent, and who chooses not to come into the assignment, but to sue his debtor, brings his action in the Circuit Court of the United States, sitting in Boston.[4] It is, however, generally true, that a discharge by the insolvent law of a State in which the contract was made, and of which the debtor was a citizen at the time it was made, is valid in another State.[5] So also it is, if the discharge be granted in a State where the contract was made between citizens of that State, and an action is brought in another State.[6]

[1] Sturges *v.* Crowninshield, 4 Wheat. 122; Mason *v.* Haile, 12 Wheat. 370; Beers *v.* Haughton, 9 Peters, 359; Gray *v.* Munroe, 1 McLean, 528; Starr *v.* Robinson, 1 Chip. 257; Fisher *v.* Lacky, 6 Blackf. 373; Woodfin *v.* Hooper, 4 Humph. 13; Bronson *v.* Newberry, 2 Doug. (Mich.) 38; M'Millan *v.* M'Neill, 4 Wheat. 209; Ogden *v.* Saunders, 12 Wheat. 213; Boyle *v.* Zacharie, 6 Peters, 348; Planters' Bank *v.* Sharp, 6 How. 328; Mather *v.* Bush, 16 Johns. 233; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Blanchard *v.* Russell, 13 Mass. 1; Kimberly *v.* Ely, 6 Pick. 440; Norton *v.* Cooke, 9 Conn. 314; Smith *v.* Parsons, 1 Ham. (Ohio) 107; James *v.* Stull, 9 Barb. 482; Bruce *v.* Schuyler, 4 Gilm. 221, 227; Stocking *v.* Hunt, 3 Denio, 274; Howard *v.* K. & L. M. Ins. Co. 13 B. Monroe, 285.

[2] The authorities on this question are not uniform. See Quackenbush *v.* Sanks, 1 Den. 128; S. C. 3 id. 594; and 1 Comstock, 129; also Vedder *v.* Alkenbrack, 6 Barb. 327. These cases would limit such a statute to subsequent debts. Not so in Rockwell *v.* Hubbell, 2 Doug. (Mich.) 197. And see Bronson *v.* Newberry, 2 Doug. 38; Evans *v.* Montgomery, 4 W. & S. 218; Bumgardner *v.* Circuit Court, 4 Miss. 50; Tarpley *v.* Hamer, 9 S. & M. 310.

[3] See some of the cases cited *supra*, n. 1; and Cook *v.* Moffat, 5 How. 295; Van Reimsdyk *v.* Kane, 1 Gall. 371; Hinkley *v.* Moreau, 3 Mason, 88; Baker *v.* Wheaton, 5 Mass. 509; Watson *v.* Bourne, 10 id. 337; Bradford *v.* Farrand, 13 id. 18; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Norton *v.* Cook, 9 Conn. 314. As to what constitutes the assent of a creditor, see Kimberly *v.* Ely, 6 Pick. 440; Agrew *v.* Pratt, 15 id. 417.

[4] See Babcock *v.* Weston, 1 Gall. 168; also Braynard *v.* Marshall, 8 Pick. 194; Norton *v.* Cook, 9 Conn. 314; Pugh *v.* Bussell, 2 Blackf. 394; Woodhull *v.* Wagner, 1 Baldwin, C. C. R. 296; Brown *v.* Stackpole, 9 N. H. 478.

[5] Blanchard *v.* Russell, 13 Mass. 1.

[6] Pugh *v.* Bussell, 2 Blackf. 366. See also May *v.* Breed, 7 Cush. 15.

CHAPTER XVI.

OF THE LAW OF PLACE.

SECTION I.

WHAT IS EMBRACED WITHIN THE LAW OF PLACE.

If both the parties to a contract were not at home, and at the same home when they entered into it, or if it comes into litigation before a foreign tribunal, then the rights and the obligations of the parties may be affected either by the law of the place of the contract, (*lex loci contractus*,) or by the law of the domicile of a party, (*lex domicilii*,) or by the law of the place where the thing is situated to which the contract refers, (*lex loci rei sitæ*,) or by the law of the tribunal before which the case is litigated, (*lex fori*.) All of these are commonly included in the *lex loci*, or, as we translate the phrase, the Law of Place.

It is obvious that this law must be of great importance wherever citizens of distinct nations have much commercial intercourse with each other. But in this country it has an especial and very great importance, from the circumstance that, while the citizens of the whole country have at least as much business connection with each other as those of any other nation, our country is composed of more than thirty separate and independent sovereignties, which are, for most purposes, regarded by the law as foreign to each other.

SECTION II.

OF THE GENERAL PRINCIPLES OF THE LAW OF PLACE.

The general principles upon which the law of place depends, are four. First, every sovereignty can bind, by its laws, all per-

sons and all things within the limits of the State.[1] Second, no law has any force or authority, of its own, beyond those limits.[2] Third, by the comity of nations, aided in our case, as to the several States, by the peculiar and close relation between the States, and for some purposes by a constitutional provision, the laws of foreign States have a qualified force and influence, which it is perhaps impossible to define or describe with precision.[3] The fourth of these general rules is, that a contract which is not valid where it is made, is valid nowhere else; and one which is valid where it is made, is valid everywhere.[4]

As contracts relate either to movables or immovables, or, to use the phraseology of our own law, to personal property or to real property, the following distinction is taken. If the contract refers to personal property, (which never has a fixed place, and is therefore called, in some systems of law, movable property,) the place of the contract governs by its law the construction and effect of the contract.[5] But if the contract refers to real property,

[1] See Ruding *v.* Smith, 2 Hagg. Consist. Rep. 383; per Lord *Mansfield*, in Campbell *v* Hall, Cowp. 208.

[2] Blanchard *v.* Russell, 13 Mass. 4; Bank of Augusta *v.* Earle, 13 Pet. 584; Le Louis, 2 Dods. 210.

[3] Story on Confl. of Laws, § 29, and note (3.)

[4] Thus, in Houghton *v.* Page, 2 N. H. 42, where the contract sued on was made in Massachusetts, and by the law of that State was void, on the ground that its consideration was usurious interest, it was held that such contract was void in New Hampshire also. And see Dyer *v.* Hunt, 5 N. H. 401; Bank of United States *v.* Donally, 8 Pet. 361; Andrews *v.* Pond, 13 id. 65; Wilcox *v.* Hunt, id. 378; Whiston *v.* Stodder, 8 Mart. 95; Andrews *v.* His Creditors, 11 Louis. 464; Van Reimsdyk *v.* Kane, 1 Gall. 371; Robinson *v.* Bland, 2 Burr. 1077; Touro *v.* Cassin, 1 N. & McCord, 173; Burrows *v.* Jemino, 2 Str. 733; Smith *v.* Mead, 3 Conn. 253; Medbury *v.* Hopkins, id. 472; Pearsall *v.* Dwight, 2 Mass. 88; Willings *v.* Consequa, Pet. C. C. 317; De Sobry *v.* De Laistre, 2 H. & Johns. 191; Trimbey *v.* Vignier, 1 Bing. N. C. 151; Alves *v.* Hodgson, 7 T. R. 241. But it seems, courts do not take notice of foreign revenue laws, and will enforce foreign contracts made in violation of them. See James *v.* Catherwood, 3 Dowl. & Ry. 190; Boucher *v.* Lawson, Cas. Temp. Hardw. 85, 194; Biggs *v.* Lawrence, 3 T. R. 454; Clugas *v.* Penaluna, 4 T. R. 466; Holman *v.* Johnson, Cowp. 341; Planché *v.* Fletcher, 1 Doug. 251; Ludlow *v.* Van Rensselaer, 1 Johns. 94. See also Wynne *v.* Jackson, 2 Russell, 351. If contracts are made only orally, where by law they should be in writing, they cannot be enforced elsewhere where writing is not required; but if made orally where writing is not required, they can be enforced in other countries where such contracts should be in writing. Vidal *v.* Thompson, 11 Mart. 23; Alves *v.* Hodgson, 7 T. R. 241; Clegg *v.* Levy, 3 Campb. 166. The rule laid down in the text is applicable to contracts of marriage. Compton *v.* Bearcroft, Bul. N. P. 113, 114; Medway *v.* Needham, 16 Mass. 157; Williams *v.* Oates, 5 Iredell, 535; Dickson *v.* Dickson, 1 Yerg. 110.

[5] Holmes *v.* Remsen, 4 Johns. Ch. 460; Harvey *v.* Richards, 1 Mason, 412; Thorne *v.* Watkins, 2 Ves. Sen. 35; Somerville *v.* Somerville, 5 Ves. 750; Bruce *v.* Bruce, 2 B. & P. 229, n. (a); *In re* Ewin, 1 C. & Jer. 156. See also Milne *v.* Moreton, 6 Binn. 353, where *Tilghman*, C. J., states the rule in the text with some qualification. He says: "This proposition is true in general, but not to its utmost extent, nor without several exceptions. In one sense, personal property has locality, that is to say, if tangible it

it is construed and applied by the law of the place where that real property is situated, without reference, so far as the title is concerned, to the law of the place of the contract.[1]

SECTION III.

OF ITS EFFECT UPON THE CAPACITY OF PERSONS TO CONTRACT.

As to the capacity of persons to enter into contracts, it is undoubtedly the general rule, that this is determined by the law of his domicile; and whatever that permits him to do, he may do anywhere. But it must be taken, we think, — for the law on this point is not certainly settled, — with this qualification, that a home incapacity, created entirely by a home law, and having no cause or necessity existing in nature, would not go with the party into another country.[2] Thus, the law of France once fixed the age of twenty-five as that of majority. If, then, a French-

has a place in which it is situated, and if invisible, (consisting of debts,) it may be said to be in the place where the debtor resides."

[1] See Warrender *v.* Warrender, 9 Bligh, 127; Dundas *v.* Dundas, 2 Dow & Clarke, 349; Kerr *v.* Moon, 9 Wheat. 565; M'Cormick *v.* Sullivant, 10 id. 192; Darby *v.* Mayer, id. 465; United States *v.* Crosby, 7 Cranch, 115; Coppin *v.* Coppin, 2 P. Wms. 291; Cutter *v.* Devanport, 1 Pick. 81; Hosford *v.* Nichols, 1 Paige, 220; Wills *v.* Cowper, 2 Hamm. 312. From these cases it is clear that the title to land can only be given or received as the law of the place where the land is situated, requires and determines. In Robinson *v.* Bland, 2 Burr. 1079, Lord *Mansfield* applies this rule to public stock. And Mr. Justice *Story*, Confl. of Laws, § 383, says: "The same rule may properly apply to all other local stock or funds, although of a personal nature, or so made by the local law, such as bank stock, insurance stock, turnpike, canal and bridge shares, and other incorporeal property, owing its existence to, or regulated by, peculiar local laws. No positive transfer can be made of such property, except in the manner prescribed by the local regulations."

[2] In Saul *v.* His Creditors, 17 Mart. 597, the court say: "Supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived, previous to his coming here, placing it at twenty-one, no objection could be, perhaps, made to the rule just stated; and it may be, and we believe would be true, that a contract made here at any time between the two periods already mentioned, would bind him. But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided, and that at the age of twenty-four, he came into this State, and entered into contracts, — would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge, and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them enforcing it, though the agreement was binding by those of their own State? Most assuredly we would not. 16 Martin, 193. Take another case. By the laws of this country, slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts, would their courts sustain the argument that his state or condition was fixed by the laws of his domicile of origin? We know they would not."

man, in England or in this country, twenty-four years old, made a purchase of goods, and gave his note for it, we have no doubt that note would be valid where it was made. But if a woman, nineteen years of age, whose home was in Vermont where women are of age at eighteen, made in Massachusetts her note for goods, we incline to think this note could not be enforced in Massachusetts; but if a woman of that age went from Massachusetts into Vermont, and there made her note, we think it could be sued there successfully. If this last note were sent back to Massachusetts, and there put in suit, we think the note should be open to no defence there that could not be urged where the note was made, (unless it was expressly to be paid in Massachusetts;) but it is quite possible that, as the law of the domicile and the law of the place of the contract were in conflict, that would prevail which was also the law of the forum, and, therefore, such a note might not be enforced by the courts in Massachusetts.[1]

SECTION IV.

OF THE PLACE OF THE CONTRACT.

A contract is made *when* both parties agree to it, and not before. It is therefore made *where* both parties agree to it, if this is one place. But if the contract be made by letter, or by separate signatures to an instrument, the contract is then made where that signature is put to it or that letter is written, which in fact completes the contract;[2] and it is the law of this place of con-

[1] In Saul *v.* His Creditors, 17 Mart. 595, the court say: "No nation will suffer the laws of another to interfere with her own, to the injury of her citizens; whether they do or not, must depend upon the condition of the country in which the foreign law is sought to be enforced — the particular nature of her legislature — her policy, and the character of her institutions. In the conflict of laws, it must be often a matter of doubt which should prevail, and whenever that doubt does exist, the court which decides will prefer the law of its own country to that of a stranger."

[2] See Chapter on Agreement and Assent. In M'Intyre *v.* Parks, 3 Met. 207, it was held, that where a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that State, and if it is valid by the laws of the latter State, it will be enforced in the State whence the letter was sent, although it would have been invalid if made there. Where A, in America, orders goods from England, and the English merchant executes the order, the contract is governed by the law of England, for the contract is there consummated. Whiston *v.* Stodder, 8 Mart. 95. And see Sortwell *v.* Hughes, 1 Curtis, 244; Orcutt *v.* Nelson, 1 Gray, 536.

tract, as we have seen, which, in general, determines its construction, and its force and effect. But this rule is subject to a very important qualification, when the contract is made in one place, and is to be performed in another place; for then, in general, the law of this last place must determine the force and effect of the contract, for the obvious and strong reason, that parties who agreed that a certain thing should be done in a certain place, intended that a legal thing should be done there, and therefore bargained with reference to the laws of the place, not in which they stood, but in which they were to act.[1]

But, for many commercial transactions, both of these rules seem to be in force; or rather to be blended in such a way as to give the parties an option as to what shall be the place of the contract, and what the rule of law which shall apply to it. Thus, a note written in Boston, and expressly payable in Boston, is, to all intents and purposes, a Boston note; and if more than six per cent. interest is promised, it is usurious, whatever may be the domicile of the parties. If made in Boston, and no place of payment is expressed, it is payable and may be demanded anywhere,[2] but would still be a Boston note. But if expressly payable in California, (where there are at this time no usury laws,) and promising to pay twenty per cent. interest, we are strongly of opinion that when payment of the note was demanded in California, the promise of interest would be held valid. So, if the note were made in California, payable in Boston, and promising to pay twenty per cent. interest, we think it would not be usurious. In other words, if a note is made in one place, but is payable in another, the parties have their option to make it bear the interest which is lawful in either place.[3] If the note made

[1] Per Lord *Mansfield*, in Robinson *v.* Bland, 2 Burr. 1077; *Baldwin*, J., in Strother *v.* Lucas, 12 Pet. 410, 436; Andrews *v.* Pond, 13 id. 65; Cox *v.* United States, 6 Pet. 172; Bell *v.* Bruen, 1 How. 182; Prentiss *v.* Savage, 13 Mass. 23; Thompson *v.* Ketcham, 8 Johns. 189; Fanning *v.* Consequa, 17 Johns. 511; LeBreton *v.* Miles, 8 Paige, 261. In this last case, the principle was applied to an antenuptial contract, and it was held, that when parties marry in reference to the laws of another country as their intended domicile, the law of the intended domicile governs the construction of their marriage contract as to the rights of personal property.

[2] Blake *v.* Williams, 6 Pick. 286; Braynard *v.* Marshall, 8 id. 194.

[3] Depau *v.* Humphreys, 20 Mart. 1; Pecks *v.* Mayo, 14 Vt. 33. This last case was an action of *assumpsit* on two promissory notes given by Horatio Gates & Co., of Montreal, to the defendants, payable in Albany, N. Y., and by the defendants indorsed to the plaintiffs. It appeared that the notes were made at Montreal, where the makers resided, and that the indorsers and the plaintiffs resided in Vermont. The lawful rate of interest in Montreal was six per cent. per annum, and in New York, seven per cent.

in Boston and payable in California, were demanded in California and unpaid, and afterwards put in suit in Massachusetts, and personal service made on the promisor there, we should say that this same interest should be recovered. And indeed, generally, that such a note, being made in good faith, should always bear this interest. So if made in Boston, and payable in New York, with seven per cent. interest. But a note made in Boston, and intended to be paid in Boston, and bearing seven per cent. interest, could not escape the usury laws of Massachusetts merely by being written payable in New York.

In everything relating to process and remedy, the law of the forum, or of the place where the suit is brought, prevails over every other.[1] This is true not only of arrest,[2] but limitation and

Redfield, J., after examining all the authorities, said: "From all which, I consider the following rules in regard to interest on contracts made in one country, to be executed in another, to be well settled: 1. If a contract be entered into in one place, to be performed in another, and the rate of interest differs in the two countries, the parties may stipulate for the rate of interest of either country, and thus, by their own express contract, determine with reference to the law of which country that incident of the contract shall be decided. 2. If the contract so entered into, stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of the other place. 3. If the contract be so entered into for money, payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest, by way of damages, shall be allowed, according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country." See also Chapman *v.* Robertson, 6 Paige, 627; 2 Parsons on Con. 95, *et seq.* See, generally, Boyce *v.* Edwards, 4 Peters, 111; Fanning *v.* Consequa, 17 Johns. 511; Winthrop *v.* Carleton, 12 Mass. 4; Foden *v.* Sharp, 4 Johns. 183; Dewar *v.* Span, 3 T. R. 425.

[1] Thus, in a suit between A & B, both resident in England, on a contract made between them in Portugal, the contract is to be interpreted according to the laws of Portugal, but the remedy must be taken according to the laws of England where the suit is brought; that is, A could arrest B in England for a debt which accrued in Portugal, while both resided there, although the Portuguese law does not allow of arrest for debt. De La Vega *v.* Vianna, 1 B. & Ad. 284. See also, Robinson *v.* Bland, 2 Burr. 1077; Smith *v.* Spinolla, 2 Johns. 198; Nash *v.* Tupper, 1 Caines, 402; Don *v.* Lippman, 5 Cl. & Fin. 1; British Linen Co. *v.* Drummond, 10 B. & Cr. 903; Trimbey *v.* Viegnier, 1 Bing. N. C. 151, 159; Van Reimsdyk *v.* Kane, 1 Gall. 371; Jones *v.* Hook, 2 Rand. 303; Lodge *v.* Phelps, 1 Johns. Cas. 139; 2 Caines's Cas. in Error, 321; Peck *v.* Hozier, 14 Johns. 346; Wilcox *v.* Hunt, 13 Pet. 378; Pickering *v.* Fisk, 6 Vt. 102. In New York, where a seal is necessary to constitute a deed, an action of covenant will not lie on a contract to be performed in Pennsylvania, with a scrawl and the word seal in the *locus sigilli*, though by the law of Pennsylvania, this constitutes a seal. The form of action relates to the remedy and is governable by the *lex fori*. Andrews *v.* Herriot, 4 Cow. 508, overruling Meredith *v.* Hinsdale, 2 Caines, 362. And see Bank of United States *v.* Donnally, 8 Pet. 361; Douglas *v.* Oldham, 6 N. H. 150; Trasher *v.* Everhart, 3 Gill & Johns. 234; Adam *v.* Kerr, 1 B. & P. 360.

[2] See De La Vega *v.* Vianna, stated *supra*. In Hinkley *v.* Marean, 3 Mason, 88, it was held, that a discharge of the person and present estate under the insolvent acts of Maryland could not be pleaded in bar of a suit in the Circuit Court in Massachusetts, so as to discharge the party from the common execution. *Story*, J., said: "When the right exists, the remedy is to be pursued according to the *lex fori* where the suit is

prescription. Thus, a foreigner, bringing in Massachusetts an action on a simple contract debt more than six years after it accrued, would find his action barred by our statute of limitation, although the debt accrued in his own country, where there might be a longer limitation or none at all.[1]

SECTION V.

OF DOMICILE.

It is sometimes important, and equally difficult, to determine where a person has his domicile. In general, it is his residence; or that country in which he permanently resides. He may change it, by a change of place, both in fact and in intent, but not by either alone.[2] But his words or declarations are not the

brought." See also, Imlay *v.* Ellefsen, 2 East, 453; Peck *v.* Hozier, 14 Johns. 346; Titus *v.* Hobart, 5 Mason, 378; Woodbridge *v.* Wright, 3 Conn. 523; Atwater *v.* Townsend, 4 Conn. 47; Smith *v.* Healy, id. 49: Whittemore *v.* Adams, 2 Cow. 626; Smith *v.* Spinolla, 2 Johns. 198.

[1] Nash *v.* Tupper, 1 Caines, 402; Bank of United States *v.* Donally, 8 Pet. 361; Ruggles *v.* Keeler, 3 Johns. 263; Decouche *v.* Savetier, 3 Johns. Ch. 190; Dupleix *v.* De Roven, 2 Vern. 540; Lincoln *v.* Battelle, 6 Wend. 475; M'Elmoyle *v.* Cohen, 13 Pet. 312; Le Roy *v.* Crowninshield, 2 Mason, 151; Van Reimsdyk *v.* Kane, 1 Gall. 137; British Linen Co. *v.* Drummond, 10 B. & Cr. 903. Where the Statute of Limitations of New York was pleaded in bar of an action brought in Connecticut, on a contract entered into in New York, by parties residing there at the time, it was held that the plea was insufficient, that the *lex fori* prevails. Medbury *v.* Hopkins, 3 Conn. 472. And see Pearsall *v.* Dwight, 2 Mass. 84; Williams *v.* Jones, 13 East, 439. In Bulger *v.* Roche, 11 Pick. 36, *Shaw*, C. J., said: — "That the law of limitation of a foreign country cannot of itself be pleaded as a bar to an action in this Commonwealth seems conceded, and is indeed too well settled by authority to be drawn in question. Byrne *v.* Crowninshield, 17 Mass. 55. The authorities, both from the civil and the common law, concur in fixing the rule, that the nature, validity, and construction of contracts is to be determined by the law of the place where the contract is made, and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued. Whether a law of prescription or statute of limitation, which takes away every legal mode of recovering a debt, shall be considered as affecting the contract like payment, release, or judgment, which in effect extinguish the contract, or whether they are to be considered as affecting the remedy only by determining the time within which a particular mode of enforcing it shall be pursued, were it an open question, might be one of some difficulty. It was ably discussed upon general principles in a late case. (Le Roy *v.* Crowninshield, 2 Mason's Rep. 151), before the Circuit Court, in which, however, it was fully conceded by the learned judge, upon a full consideration and review of all the authorities, that it is now to be considered a settled question." But see Don *v.* Lippman, 5 Cl. & Fin. 16; Huber *v.* Steiner, 2 Bing. N. C. 202.

[2] Not merely by intention, as we see from Hallowell *v.* Saco, 5 Greenl. 143; The Attorney-General *v.* Dunn, 6 M. & W. 511; The State *v.* Hallett, 8 Ala. 159; Williams *v.* Whiting, 11 Mass. 423. Nor merely by an absence, without the intent of remaining. Granby *v.* Amherst, 7 Mass. 1; Lincoln *v.* Hapgood, 11 Mass. 350; Wilton *v.* Falmouth, 15 Maine, 479; Harvard College *v.* Gore, 5 Pick. 370; Cadawalader *v.* Howell, 3 Harr. (N. J.) 138. One may have his domicile in one place, and yet dwell for a large part of his time in another. Frost *v.* Brisbin, 19 Wend. 11. But no person can have more

only evidence of his intent; and they are much stronger evidence when against his interest than when they are in his favor. Thus, one goes from Boston to England. If he goes intending not merely to travel, but to change his residence permanently, and not to return to this country unless as a visitor, he changes his domicile from the day that he leaves this country. Let us suppose, however, that he is still regarded by our assessors as residing here although travelling abroad, and is heavily taxed accordingly. If he can prove that he has abandoned his original home, he escapes from the tax which he must otherwise pay.[1] Now, his declarations that he has no longer a home here, and that his residence is permanently fixed in England, and the like, would be very far from conclusive in his favor, and could indeed be hardly received as evidence at all, unless they were connected with facts and circumstances.[2] But if it could be shown that he had constantly asserted that he was still an American, that he had no other permanent residence, no home but that which he had temporarily left as a traveller, such declarations would be almost conclusive against him. In general, such a question would be determined by all the words and acts, the arrangement of property at home, the length and the character of the residence abroad, and all the facts and circumstances which would indicate the actual intention and understanding of the party.[3]

than one domicile. Crawford *v.* Wilson, 4 Barb. 504; Abington *v.* North Bridgewater, 23 Pick. 170. It is agreed that "residency" and "inhabitancy" mean the same thing. Roosevelt *v.* Kellogg, 20 Johns. 208. In the matter of Wrigley, 4 Wend. 602, 8 id. 134. But as to the meaning of domicile, see Thorndike *v.* The City of Boston, 1 Met. 242, where the court said, — "If a seaman without family or property, sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent for many years, yet if he does not, by some actual residence or other means, acquire a domicile elsewhere, he retains his domicile of origin." So in Crawford *v.* Wilson, 4 Barb. 522, where the court put soldiers and seamen on the same footing with foreign ministers in respect to domicile. And see Sears *v.* The City of Boston, 1 Met. 250; Jefferson *v.* Washington, 19 Maine, 293. In the matter of Thompson, 1 Wend. 45; McDaniel *v.* King, 5 Cush. 473.

[1] Thorndike *v.* The City of Boston, 1 Met. 242.

[2] Id. Sears *v.* The City of Boston, 1 Met. 250.

[3] In Shelton *v.* Tiffin, 6 How. 185, the court said: "On a change of domicile from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained may be sufficient." See also Bruce *v.* Bruce, 2 B. & P. 229, n. (*a*).

CHAPTER XVII.

OF THE LAW OF SHIPPING.

SECTION I.

OF THE OWNERSHIP AND TRANSFER OF SHIPS.

The Law of Shipping may be considered under three divisions. First, as to ownership and transfer of ships. Second, as to the employment of ships as carriers of goods, or passengers, or both. Third, as to the navigation of ships. We begin with the first topic.

Ships are personal property; or, in other words, a ship is a chattel; and yet its ownership and transfer are regulated in this country by rules quite analogous to those which apply to real property.

The Constitution of the United States gives to Congress the power to enact laws for the regulation of commerce. And in execution of this power, acts were passed in 1792, and immediately after, which followed substantially, (with one important exception, to be hereafter noticed) the Registry and Navigation Laws of England, one of which had been in force about a century and a half, and to which it was supposed that the commercial prosperity of England was in a great measure due.[1]

To secure the evidence of the American character of a vessel, the statute of 1792 provides for an exact system of registration in the custom-house. There is no requirement of registration.

[1] The first statute regulating the registry of shipping in England, appears to have been the 12 Car. 2, c. 18, s. 10, A. D. 1660. But the most important one, and that from which our own statute on that subject was for the most part taken, was the 26 Geo. 3, c. 60. A Ship Registry Act was passed by Congress, September 1, 1789, ch. 11, (1 U. S. Stats. at Large, 55.) But the act now in force, regulating the registry of vessels, was passed December 31, 1792, ch. 45, (1 U. S. Stats. at Large, 287.) Acts, additional or amendatory to the above have been passed at various times since. March 2, 1797, ch. 61, (1 U. S. Stats. at Large, 498); June 27, 1797, ch. 5, (1 U. S. Stats. at Large, 523); March 2, 1803, ch. 71, (2 U. S. Stats. at Large, 209, 210); March 27, 1804, ch. 52, (2 U. S. Stats. at Large, 296, 297); March 3, 1813, ch. 192; July 29, 1850, ch. 27. For the origin of Navigation Laws, see Reeves's Hist. of Shipping, p. 35; 1 Brown's Civ. & Ad. Law, p. 125.

The law does not say that any ship shall or must be registered; but that certain ships or vessels may be. And the disadvantage of being without registry operates as effectually as positive requirement with a heavy penalty could do.

The ships which may be registered, are those already registered, 31 Dec. 1792, under the act of Sept. 1789; those built within the United States, and owned wholly by citizens thereof; and those captured and condemned as prizes, or adjudged forfeited by violation of law, if owned wholly by citizens of this country. No ship can be registered, if an owner or part owner usually reside abroad, although a citizen, unless he be a consul of the United States, or agent for, and a partner in, a mercantile house established and doing business here;[1] nor if the master be not a citizen of the United States;[2] nor if the owner or part owner be a naturalized citizen, and reside in the country whence he came more than a year, or in any foreign country more than two years, unless he be consul or public agent of the United States. But a ship which has lost the benefits of registry, by the non-residence of an owner in such a case, may be registered anew if she become the property of a resident citizen, by *bonâ fide* purchase;[3] nor can a ship be registered which has been, at any time, the property of an alien, unless she becomes the property of the original owner or his representative.[4]

Sometimes Congress, by special acts, permits the registration, as an American ship, of a vessel which has become, by purchase, American property. If a registered American ship be sold or transferred, in whole or in part, to an alien, the certificate of registry must be delivered up, or the vessel is forfeited; but if, in case of a sale in part, it can be shown that any owner of a part not so sold

[1] Act of Dec. 31, 1792, ch. 45, §§ 1, 2, (1 U. S. Stats. at Large, 288.) The owner of the legal interest only is entitled to a register, unless the equitable interest belong to foreigners. Weston *v.* Penniman, 1 Mason, 306.

[2] Act of Dec. 31, 1792, ch. 45, § 4, (1 U. S. Stats. at Large, 288.) But the master, if a native citizen of the United States, may reside in a foreign country. United States *v.* Gillies, Pet. C. C. 159.

[3] Act of March 27, 1804, c. 52, § 1, (2 U. S. Stats. at Large, 296, 297.)

[4] Act of June 27, 1797, c. 5, (1 U. S. Stat. at Large, 523); Act of March 27, 1804, c. 52, § 2, (2 U. S. Stats. at Large, 296, 297.) If an American vessel is assigned to a foreigner, she loses, *ipso facto*, her American character. United States *v.* Willings, 4 Dall, 374; Philips *v.* Ledley, 1 Wash. C. C. 229. The more natural construction of the act of 1797, c. 5, would seem to exclude a vessel which has been sold to a foreigner, from the benefits of registry, even if it should come back into the hands of the original owner; but in practice the act seems to have been construed otherwise. But see United States *v.* Willings, 4 Cranch. 48, per *Marshall*, C. J.

was ignorant of the sale, his share shall not be subject to such forfeiture.[1] And as soon as a registered vessel arrives from a foreign port, her documents must be deposited with the collector of the port of arrival, and the owner, or, if he does not reside within the district, the master, must make oath that the register contains the names of all persons who are at that time owners of the ship, and at the same time report any transfer of the ship, or of any part, that has been made within his knowledge since the registry; and also declare that no foreigner has any interest in the ship.[2] If a register be issued fraudulently, or with the knowledge of the owners, for a ship not entitled to one, the register is not only void, but the ship is forfeited.[3] If a new register is issued, the old one must be given up;[4] but where there is a sale by process of law, and the former owners withhold the register, the secretary of the treasury may authorize the collector to issue a new one.[5] If a ship be transferred while at sea, or abroad, the old register must be given up, and all the requirements of law, as to registry, &c., be complied with, within three days after her arrival at the home port.[6]

Exclusive privileges have at various times been granted to registered vessels of the United States. By the statute of 1817, it is provided, that no merchandise shall be brought from any foreign country to this, except in American vessels, or in vessels belonging to that country of which the merchandise is the growth. Also, that no merchandise shall be carried from port to port in the United States, by any foreign vessel, unless it formed a part of its original cargo.[7] A ship that is of twenty tons burden, to be employed in the fisheries, or in the coasting trade, need not be registered, but must be enrolled and licensed accord-

[1] Act of Dec. 31, 1792, c. 45, § 7–16, (1 U. S. Stats. at Large, 288.)

[2] Act of 1799, c. 128, § 63, (1 U. S. Stats. at Large, 675); Act of Dec. 31, 1792, c. 45, § 17, (1 U. S. Stats. at Large, 288.)

[3] Act of Dec. 31, 1792, c. 45, § 27, (1 U. S. Stats. at Large, 298.) See the case of The Neptune, 3 Wheaton, 601.

[4] Act of Dec. 31, 1792, c. 45, § 14, (1 U. S. Stats. at Large, 295.) And when the certificate of registry is given up, the collector of the district in which it was registered will cancel the bond given at the time the certificate was granted. § 18.

[5] Act of 1797, c. 61, § 1, (1 U. S. Stats. at Large, 498.)

[6] Act of March 2, 1803, c. 71, § 3, (2 U. S. Stats. at Large, 210); Act of 1799, c. 128, § 30, (1 U. S. Stats. at Large, 649.) But where a vessel was sold at sea to American citizens, and repurchased on her arrival and before entry at the custom-house, by the original owners, it was held that a new registry was unnecessary. United States *v.* Willings, 4 Cranch, 48; S. C. 4 Dall. 374.

[7] Act of 1817, c. 204, (3 U. S. Stats. at Large, 351.)

ingly.[1] If under twenty tons burden, she need only be licensed. If licensed for the fisheries, she may visit and return from foreign ports, having stated her intention of doing so and being permitted by the collector.[2] And if registered, she may engage in the coasting trade or fishery, and if licensed and enrolled, she may become a registered ship, subject to the regulations provided for such cases.[3]

A ship that is neither registered nor licensed and enrolled, can sail on no voyage with the privilege or protection of a national character or national papers. If she engages in foreign trade, or the coasting trade, or fisheries, she is liable to forfeiture; and if she have foreign goods on board, must at all events pay the tonnage duties leviable on foreign ships. In these days, no ship engaged in honest business, and belonging to a civilized people, is met with on the ocean, without having the regular papers which attest her nationality, unless she has lost them by some accident.

SECTION II.

OF THE TRANSFER OF PROPERTY IN A SHIP.

The Statute of Registration provides, that "in every case of sale or transfer, there shall be some instrument in writing, in the nature of a bill of sale, which shall recite at length the said certificate; otherwise the said ship or vessel shall be incapable of being registered anew."[4] It follows, therefore, that a merely oral transfer, although for valuable consideration, and followed by possession, gives the transferree no right to claim a new register setting forth his ownership. But this is all. There is nothing in this statute to prevent the property from vesting in such transferree. It is, however, unquestionably a principle of the maritime law generally, that property in a ship should pass by a written instrument. And as this principle seems to be adopted by the statute, the courts have sometimes almost denied the validity of a merely parol transfer. The weight of authority and of reason is, however, undoubtedly, in favor of the conclusion that "the registry acts have not, in any degree, changed the common law

[1] Act of 1793, c. 52, (1 U. S. Stats. at Large, 306.)
[2] Act of 1793, c. 52, § 27, (1 U. S. Stats. at Large, 306.)
[3] Act of 1793, c. 53, § 3, *supra.*
[4] Act of 1792, c. 45, § 14, *supra.*

as to the manner of transferring this species of property."[1] It would follow, therefore, that such transfer would be valid, and would pass the property.[2]

The English Registry Act provides that "when the property in any ship, or in any part thereof, shall, after registry, be sold, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry, or the principal contents thereof; otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity."[3] Our Registry Act contained no such provision. Perhaps this important omission arose from a doubt whether legislating concerning the transfer of ships at home, as property, could be considered as a regulation of commerce; for if not, it was not within their constitutional power.

In 1850, Congress, however, passed an act, "to provide for recording the conveyances of vessels, and for other purposes." By this statute it was provided "that no bill of sale, mortgage, hypothecation, or conveyance, of any vessel or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled." Then follows an exception in favor of liens by bottomry, and in subsequent sections are provisions for recording by the collector, and giving certificates, &c.[4]

[1] Weston *v.* Penniman, 1 Mason, 317.

[2] In Ohl *v.* The Eagle Ins. Co. 4 Mason, 172, Mr. Justice *Story* expressed an opinion that the title to a ship could not pass by parol. The learned judge cited the authority of Lord *Stowell* in The Sisters, 5 Rob. Adm. 155, who said: "According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships, in the usage of all maritime countries; and in no degree a peculiar title deed or conveyance known only to the law of England. It is what the maritime law expects, what the court of admiralty would, in its ordinary practice, always require, and what the legislature of this country has now made absolutely necessary." See also Weston *v.* Penniman, 1 Mason, 316, 317; 3 Kent's Comm. 130, 131. But it seems to be well settled in the United States, that, at common law, the title to a vessel may pass by delivery, under a parol contract. Bixby *v.* Franklin Ins. Co. 8 Pick. 86; United States *v.* Willings, 4 Cranch, 55; Badger *v.* Bank of Cumberland, 26 Maine, 428; Wendover *v.* Hogeboom, 7 Johns. 308; Vinal *v.* Burrill, 16 Pick. 401; Leonard *v.* Huntington, 15 Johns. 298; Thorn *v.* Hicks, 7 Cowen, 698, 699; Fontaine *v.* Beers, 19 Ala. 722.

[3] 3 & 4 Wm. 4, c. 55, § 31; 26 Geo. 3, c. 60, § 17; 8 & 9 Vict. c. 89, § 34. Under these acts it is held that no action can be maintained upon an executory contract to sell a ship, unless it contain a recital of the certificate of registry. Duncan *v.* Tindal, 20 Eng. L. & Eq. 224; see also, McCalmont *v.* Rankin, 19 Eng. L. Eq. 176.

[4] Act of 1850, c. 27, (9 U. S. Stats. at Large, 440.)

This statute has no effect, that we perceive, upon oral transfers, excepting that as they cannot be recorded, their operation is limited to the grantors and those who have actual notice. Where the transfer is by bill of sale, the record of this, under the late statute is, perhaps, notice to all the world. But in most of our States there are already provisions for the record of mortgages of personal property, and it may be a difficult question how these are affected by this statute of the United States. For example, if there be such a record as is required by the state law, is this sufficient, without a custom-house record, either because it is a public notice, which is the equivalent of actual notice to everybody, or because the State has the right to regulate this matter; or, if there be a record in the custom-house and none which conforms to the state requirements, is this sufficient against all the world? If we suppose this statute to be constitutional, of which we do not, however, feel certain, we should say that it controlled and superseded the state statute, so as to make that unnecessary and ineffectual; and therefore a record in the custom-house only would be sufficient, and a record under the state law would affect only those who had actual knowledge of it.[1]

As a ship is a chattel, a transfer of it should be accompanied by a delivery of possession. Actual delivery is sometimes impossible where a ship is at sea; and perhaps the statute of 1850 makes the record of the transfer equivalent to change of possession. If there be no record, possession should be taken as soon as possible; and prudence would still require the same course, we think, in case of transfer by writing and record.[2]

There have been cases which have been supposed to intimate

[1] In Fontaine *v.* Beers, 19 Ala. 722, it was held that a statute of Alabama, requiring the registration of mortgages, deeds of trust, &c., on personal property, did not apply to vessels for the navigation of the ocean — and that the evidence of their title was governed by the acts of Congress. We are not sure that this statute, which regulates the transfer of ships at home, is a proper exercise of the power to "regulate commerce."

[2] In Kirkley *v.* Hodgson, 1 B. & C. 588, a part of a ship was transferred, and all the forms prescribed by the registry acts complied with. But the possession was not changed. *Bayley*, J., said: "It has been decided, in the cases of Monkhouse *v.* Hay, 2 Brod. & B. 114; Hay *v.* Fairbairn, 2 B. & Ald. 193; Robinson *v.* Macdonnell, 5 M. & S. 228, that the alteration of the register is not to be considered as notice to the world. The register acts were made entirely *alio intuitu*; their object was not to give notice to the world, but to give notice to government. The fact of altering the register is to be considered as much a secret act as the execution of a secret conveyance; so that, though the true ownership would appear on the face of the register, that does not vary the case." It is obvious, however, that these remarks will not apply to the Act of 1850, c. 27.

that, as between two innocent purchasers, he that gets actual possession first completes his title as against the other. We doubt the correctness of this.[1] We say rather that if A becomes the *bonâ fide* purchaser of a vessel, and has taken constructive possession, he has no right to delay unnecessarily the taking actual possession, for this may deceive and injure other persons. And if B, a second purchaser, in ignorance of the first, during such delay or laches, gets actual possession, he would hold the vessel; unless, indeed, prevented by the record. But if B gets actual possession before A, but while A was so prevented that his want of actual possession cannot be imputed to him as laches, he will get a better title than B, if he (A) takes actual possession as soon as he can.[2]

[1] It is now well settled that, as between the parties, the property in goods sold will pass to the purchaser, although the possession may remain in the vendor. 1 Parsons on Contracts, 440, 441. But under the statute of 13 Eliz. to render the transfer valid as to third parties without notice, there must be a change of possession. 1 id. 441; Twyne's case, 1 Smith's Lead. Cas. 1. But in some cases this change may be constructive; and the delivery, as is often said, may be symbolical. But there is no case in which delivery either actual or symbolical may be dispensed with. Much inaccuracy in the use of language seems to have arisen in some cases from mistaking the nature of symbolical delivery, and in others, from overlooking it entirely. The cases of Lamb *v.* Durant, 12 Mass. 54, and Lanfear *v.* Sumner, 17 Mass. 110, have been supposed to support the doctrine that, as between two innocent purchasers, he who acquires actual possession first completes his title as against the other, and the latter case has been questioned on that ground. Ingraham *v.* Wheeler, 6 Conn. 284; Ricker *v.* Cross, 5 N. H. 573. But they do not seem to us to go further than to decide that, of two innocent purchasers, he who gets actual possession first, has a better title than the one who has no possession at all, either actual or constructive, and so far they seem to be sound law. In Lanfear *v.* Sumner, the goods were supposed by the owners in Philadelphia, to be at sea. They were actually landed in Boston. A written assignment was made in Philadelphia and delivered, but no money was paid, no bill of lading transferred, and there was no pretence whatever of any symbolical delivery. The court (per *Jackson*, J.,) did not deny that, if there had been a legal, as distinguished from an actual delivery, to the first purchaser, his title would have been protected. See also, Gardner *v.* Howland, 2 Pick. 599, per *Parker*, C. J. In Lamb *v.* Durant, 12 Mass. 54, the vessel was owned by a firm. One partner was abroad and in actual possession of the vessel. It was held, that, under the circumstances of the case, a transfer by the home partner, must be subject to all incumbrances, made by the partner in possession, before notice of transfer, and that accordingly a sale with delivery of possession by the latter would intercept the title attempted to be passed by a sale by the former. This seems to be reasonable, for it might well be held that in such a case there could be no constructive delivery by the home partner.

[2] In England, a constructive delivery of a vessel at sea is effected by a transfer of the Grand Bill of Sale. Atkinson *v.* Maling, 2 Term. 462; *Ex parte* Matthews, 2 Ves. 272; Kirkley *v.* Hodgson, 1 B. & C. 588. In this country, the delivery of an ordinary bill of sale has the same effect. Portland Bank *v.* Stacey, 4 Mass. 661; Putnam *v.* Dutch, 8 Mass. 287; Badlam *v.* Tucker, 1 Pick. 396; Wheeler *v.* Sumner, 4 Mason, 183. In Joy *v.* Sears, 9 Pick. 4, 5, *Parker*, C. J., said: "By the principles of maritime law, well known and adopted by the common law, the property passed by the execution and delivery of the bill of sale, subject however to be defeated, if, after the arrival of the vessel at her home port, there should be such a delay in taking possession by the vendor as should indicate a fraudulent intention in the transfer, and when the delay and negligence are gross, they will of themselves defeat the conveyance

It is easy to suppose many other questions arising under this statute of 1850, to which it will be impossible to give certain answers, until the construction of the statute is settled by adjudication.

By the word "ship," and still more by the phrase "ship and her appurtenances — or apparel — or furniture," every thing would pass which was distinctly connected with the ship, and is on board of her, and fastened to her if that be usual, and needed for her navigation or for her safety.[1]

against any subsequent purchaser or attaching creditor. This delay and negligence must be judged of by the jury; for, whether they exist or not, depends upon the situation and circumstances of the vessel and of the vendee." Notice to the captain may, in some cases, be equivalent to taking actual possession. Brinley *v.* Spring, 7 Greenl. 241; Mair *v.* Glennie, 4 M. & S. 240. In Turner *v.* Coolidge, 2 Metc. 350, the court was "inclined to the opinion that the possession of one part owner, who acts for himself, and at the request of the other part owner, acts for him, supersedes the necessity of a formal taking of possession, and vests the property in the vendee." See also, Winsor *v.* McLellan, 2 Story, 497; Addis *v.* Baker, 1 Anst. 222; Gillispy *v.* Coutts, Ambler, 652. It has been held that, when the sale is conditional, and there is an agreement that the mortgagor shall retain possession until condition broken, then the mortgagee need not take actual possession. Badlam *v.* Tucker, 1 Pick. 389; D'Wolf *v.* Harris, 4 Mason, 515; Conrad *v.* Atlantic Ins. Co. 1 Pet. 449. But see as to this point, 1 Smith, Lead. Cas. 1; Twyne's case, note by Mr. Wallace. See also, Portland Bank *v.* Stubbs, 6 Mass. 422; Tucker *v.* Buffington, 15 Mass. 480.

[1] The construction of these words must depend upon the instrument in which they are used, and in some degree upon the circumstances of each case. Hoskins *v.* Pickersgill, 2 Marsh. Ins. 727; Dundee, 1 Hagg. Ad. 109; S. C. (Gale *v.* Laurie,) 5 B. & C. 156; Richardson *v.* Clark, 15 Maine, 421; Lano *v.* Neale, 2 Stark. N. P. 105; Kynter's case, 28 & 29 Eliz. C. P. Leon. 146, 47; Starr *v.* Goodwin, 2 Root, 71; Briggs *v.* Strange, 17 Mass. 405; Roccus, Not. 20; Molloy de Jure Marit. book 2, c. 1, § 8. In the case of The Dundee, 1 Hagg. Ad. 127, Lord *Stowell* said: "The word 'appurtenances' must not be construed with reference to the abstract naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel. In Richardson *v.* Clark, it was held that a chronometer, on board a vessel, did not pass under a bill of sale, of a vessel, with all and singular her tackle, apparel and furniture. But see Langton *v.* Horton, 6 Jurist, 594; S. C. 23 Leg. Obs. 524. In Lane *v.* Neale, "kentledge," a valuable kind of permanent ballast, was claimed under a conveyance of a ship with all stores, tackle, apparel, &c. Lord *Ellenborough*, said: "It could not be considered as part of the ship or necessary stores, since common ballast might have been used." In Woods *v.* Russell, 5 B. & Ald. 942, the rudder and cordage, which were designed for a vessel, which was not quite finished, were held to pass with it, although they were not actually attached to the vessel at the time of its delivery. Whether a boat would pass with the ship, would seem to depend upon circumstances. In Starr *v.* Goodwin, *supra*, it was held that it would not. See also, Roccus, Not. 20; Straccha de Navibus, pars, 2, No. 12; Molloy de Jure Maritimo, book 2, c. 1, § 8. In Briggs *v.* Strange, 17 Mass. 405, *Parker*, C. J., said: "Whether the boat, cables, and anchors of a vessel, could be attached, and so separated from a vessel, may depend upon the situation of those articles in relation to the vessel. To take a boat or cable and anchor from a vessel when they are in use, and necessary to the safety of the vessel, would expose the party to damages. But if the vessel were at a wharf, and her cable and anchor and boat not in use, there seems to be no reason why they may not as well be taken as the harness of a carriage, or the sails and rigging of a vessel when separated from the hull, and laid up on shore." In a policy of insurance, the word ship usually includes the boat. Emerigon, c. 4, § 7; Hall *v.* Ocean Ins. Co. 21 Pick. 472. See also Shannon *v.* Owen, 1 Man. & Ryland, 392.

Sometimes when a ship is built, she is paid for by instalments. If these are regulated by the progress in building, so that when so much is done, a sum deemed equivalent to the labor and materials used shall be paid, and when more is done, another sum in due proportion, and so on, it is held that each payment purchases the ship as she lies; and if she be lost after any such payments, the loss is the purchasers.[1] A sale by the decree of any regular court of admiralty, with due notice to all parties, and with proper precautions to protect the interests of all, and guard against fraud or precipitancy, would undoubtedly be acknowledged by courts of admiralty of every other nation as transferring the property effectually.[2]

[1] This doctrine was first sanctioned in England, in Woods *v.* Russell, 5 B. & Ald. 946; but the case was not decided upon that alone. It was recognized in Atkinson *v.* Bell, 8 B. & C. 282, and in Battersby *v.* Gale, 4 Ad. & Ell. 458, note. But the question was thoroughly discussed in Clarke *v.* Spence, 4 Ad. & Ell. 448, and after some hesitation the court decided, "that where the contract provides, that a vessel shall be built under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments, regulated by particular stages in the progress of the work, the general property in all the planks and other things used in the progress of the work, vest in the purchaser at the time when they are put to the fabric under the approval of the superintendent, or at all events, as soon as the first instalment is paid." See also, Read *v.* Fairbanks, 24 Eng. L. Eq. 220. This rule prevails in Scotland. Bell on Sales, (1844,) p. 17. But if the time of payment is not regulated by the progress of the work, then the property does not pass till the vessel is completed. Laidler *v.* Burlinson, 2 Mees. & Wels. 602. See also Mucklow *v.* Mangles, 1 Taunt. 318. This precise question does not appear to have been decided in the American courts. But in Glover *v.* Austin, 6 Pick. 209, it was held that a conveyance and symbolical delivery of the keel, after it had been laid, vested the property of that in the vendee, and drew after it all subsequent additions, according to the maxim of the civil law: *proprietas navis carinæ causam sequitur*. See also, Bonsey *v.* Amee, 8 Pick. 236; Johnson *v.* Hunt, 11 Wend. 135.

[2] When a vessel is sold, to discharge any lien, known to the Maritime Law, or under a sentence of forfeiture for the violation of revenue or other laws, the title, conferred by the court, is valid against the whole world, and is recognized by the courts of all countries. The Tremont, 1 W. Rob. 163; Attorney-General *v.* Norstedt, 3 Price, 97; 3 Kent's Com. 132; The Helena, 4 Rob. 3; Grant *v.* McLachlin, 4 Johns. 34. But the question arose in Reid *v.* Darby, 10 East, 143, whether courts of admiralty have jurisdiction to decree "upon the mere petition of the captain, the sale of a ship reported upon survey to be unseaworthy, and not repairable, so as to carry the cargo to the place of destination, but at an expense exceeding the value of the ship when repaired." The English Courts of Common Law have held that there is no such jurisdiction in their courts, although they admit that it has obtained abroad. Hunter *v.* Prinsep, 10 East, 378; Morris *v.* Robinson, 3 Barn. & Cress. 203. But Lord *Stowell* expressed regret at the want of such jurisdiction. The Fanny & Elmira, Edwards, Ad. 119; The Warrior, 2 Dods. 293; The Pitt, 1 Hagg. Ad. 240. And in this country the jurisdiction seems to be admitted. In the case of The Schooner Tilton, 5 Mason, 465, 474, *Story*, J., said: "If what is suggested in that case, (Reid *v.* Darby,) as to the want of jurisdiction in the admiralty courts to decree the sale of a ship in a case of necessity upon an application of the master, I, for one, cannot assent. I agree that, in such a case, the decree of sale is not conclusive upon the owner, or upon third persons, because it is made upon the application of the master, and not in an adverse proceeding. But I cannot but consider it as strictly within the admiralty jurisdiction. It is *primâ facie* evidence of a rightful exercise of authority, but no more. The proceeding being *ex parte*, cannot be deemed conclusive in favor of the party

SECTION III.

OF PART-OWNERS.

Two or more persons may become part-owners of a ship, in either of three ways. They may build it together, or join in purchasing it, or each may purchase his share independently of the others. In either case, their rights and obligations are the same.

If the register, or the instrument of transfer, or other equivalent evidence, do not designate specific and unequal proportions, they will be presumed to own the ship in equal shares.[1]

Part-owners are not necessarily partners. But a ship, or any part of a ship, may constitute a part of the stock or capital of a copartnership; and then it will be governed, in all respects, by the law of partnership.[2]

A part-owner may at any time sell his share to whom he will. But he cannot sell the share of any other part-owner, without his authority.[3] If he dies, his share goes to his representatives, and not to the surviving part-owners.[4]

promoting it." See also, Janney *v.* Columbian Ins. Co. 10 Wheat. 411, 418; Dorr *v.* Pacific Ins. Co. 7 Wheat. 612; Armroyd *v.* Union Ins. Co. 2 Binn. 394; Steinmetz *v.* United States Ins. Co. 2 Serg. & Rawle, 293.

[1] Glover *v.* Austin, 6 Pick. 209, 221, per *Parker*, C. J.; Ohl *v.* The Eagle Ins. Co. 4 Mason, 172. But the act of 1850, c. 27, § 5, provides that "the part or proportion of the vessel, belonging to each owner, shall be inserted in the register of enrolment."

[2] Harding *v.* Foxcroft, 6 Greenl. 77; Lamb *v.* Durant, 12 Mass. 54; Nicoll *v.* Mumford, 4 Johns. Ch. 525, S. C. 20 Johns. 611; Phillips *v.* Purington, 15 Maine, 425; French *v.* Price, 24 Pick. 13; Seabrook *v.* Rose, 2 Hill, Ch. (S. Car.) 555; Patterson *v.* Chalmers, 7 B. Mon. 595. In Harding *v.* Foxcroft, *Mellen*, C. J., said: "There may be a partnership, as well as a co-tenance, in a vessel. When a person is to be considered as a part-owner, and when as a partner, in a ship, depends on circumstances. The former is the general relation between ship-owners, and the latter the exception, and it is required to be shown specially."

[3] In Lamb *v.* Durant, 12 Mass. 54, 56, R. L., a partner in the firm owning the vessel, had sold it. *Parker*, C. J., said: "With respect to the authority of R. L., to sell his partner's interest, it cannot result merely from his being a part-owner of the vessel; for part-owners are only tenants in common, and one of them cannot, by his sole act, transfer the property of another, unless under circumstances which furnish a presumption of an assent by him who does not join in the conveyance."

[4] In a note, in Abbott on Shipping, p. 97, first introduced by the author into the fourth edition, it is supposed that, if a ship were granted to a number of persons generally, without distinguishing in any way the shares of each, they would become joint tenants at law, and that the rule *jus accrescendi inter mercatores locum non habet*, could be enforced only in equity. But this is certainly not the American law; and we doubt if it be English law. See cases cited in the two preceding notes, and, also, Merrill *v.* Bartlett, 6 Pick. 46; Jackson *v.* Robinson, 3 Mason, 138; Buddington *v.* Stewart, 14 Conn. 404; Macy *v.* De Wolf, 3 W. & M. 193, 204; Milburn *v.* Guyther, 8 Gill, 92.

A majority of the part-owners may, generally, manage and direct the employment of the property at their discretion.[1] But a court of admiralty will interfere and do justice between them, and prevent either of the part-owners from inflicting injury upon the others.[2]

One part-owner may, in the absence of the rest, and without prohibition from them, manage the ship, as for himself and for them. And the contracts he enters into, in relation to the employment or preservation of the ship, bind all the part-owners in favor of an innocent third party.[3]

In general, all the part-owners are liable, each one for the

[1] Willings *v.* Blight, Pet. Adm. 288; Steamboat Orleans *v.* Phœbus, 11 Pet. 175; Davis *v.* The Seneca, Gilpin, 24; Loring *v.* Illsley, 1 Cal. 24. The same rule prevails in some foreign codes. Cours de Droit Commercial, Art. 621; 2 Magens, 108, Art. 171.

[2] "For this purpose, it has been the practice of the Court of Admiralty, from very remote times, to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. When this is done, the dissentient part-owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the others." Abbott on Shipping, 100; The Apollo, 1 Hagg. 311; Petrel, 3 Hagg. 299; Willings *v.* Blight, Pet. Adm. 288; Steamboat Orleans *v.* Phœbus, 11 Pet. 183; Davis *v.* The Seneca, Gilpin, 24; S. C. 18 Am. Jurist, 486, 490; Rodick *v.* Hinckley, 8 Greenl. 274; The Lodermia, Crabbe, 271; Buddington *v.* Stewart, 14 Conn. 404. And, at law, an agreement of a majority of the part-owners of a vessel, to intrust the command of a vessel to a particular person, was held void, as conflicting with the exercise of that free and impartial judgment which they were bound to exercise. Card *v.* Hope, 2 B. & C. 661. If the part-owners are equally divided, one half in favor of employing the vessel, the other half opposed, the former can employ her, upon giving bonds. 3 Kent's Com. 153. In Steamboat Orleans *v.* Phœbus, 11 Pet. 175, 183, *Story*, J., said: "The minority of the owners may employ the ship in like manner, if the majority decline to employ her at all;" and the minority will, in that case, "be entitled to all the profits of the voyage or adventure, and are to bear all the expenses and outfits and risks thereof." See also 3 Kent's Com. 156; Molloy, b. II. c. 1, § 2, p. 308. But where part-owners, having equal interests, are both willing to employ the vessel, but differ as to the voyage, or when, in such a case, each part-owner is willing to take the vessel on a voyage to be planned by himself, but will not coöperate with the other, it does not seem to be well settled what a court of admiralty will do. The English admiralty courts have no authority to sell in such a case. Ouston *v.* Hebden, 1 Wils. 101; The Apollo, 1 Hagg. 306. This authority was followed in Davis *v.* The Seneca, Gilpin, 10; but in the Circuit Court, the decision was overruled by *Washington*, J., who, on the authority of the French Ordonnance de la Marine, sections, 5, 6, held that a sale could be decreed in such cases. 18 American Jurist, 486. See also Skrine *v.* The Hope, Bee's Adm. 2; Benedict's Adm. 40. Unless a bond is taken by the dissentient part-owners, in the cases above mentioned, it seems that they will have no remedy in case the ship is lost. Graves *v.* Sawcer, Sir T. Raym. 15, 1 Lev. 29. See also Gould *v.* Stanton, 16 Conn. 12; Moody *v.* Buck, 1 Sandf. 304.

[3] Chapman *v.* Durant, 10 Mass. 47; Schermerhorn *v.* Loines, 7 Johns. 311; Muldon *v.* Whitlock, 1 Cow. 290; Hardy *v.* Sproule, 29 Maine, 258; Davis *v.* Johnston, 4 Sim. 539; Darby *v.* Baines, 12 Eng. Law and Eq. 238. But one part-owner of a vessel is not liable to another for repairs made at a home port, without his consent. Hardy *v.* Sproule, 31 Maine, 71. See also Benson *v.* Thompson, 27 Maine, 471.

whole amount, for all the repairs of a ship, or for necessaries actually supplied to her, in good faith.[1] If one pays his part, or more than his share, and it is agreed that he shall not be held further, still, if the others do not pay, he must, unless there is a better consideration for the promise not to call on him, than his merely paying a part of what he was legally bound to pay. If he had a discharge under seal, it might protect him at law, but would not, of itself, in admiralty.[2]

If it can be clearly shown, however, that especial credit was given, and intended to be given, to one part-owner personally, to the exclusion of the others, then the others cannot be holden.[3] If the goods were charged to "ship" so and so, or to "ship and owners," this would tend strongly to show that it was intended to supply them on the credit of all the owners. If charged to some one owner alone, this would not absolutely prove that credit was intentionally given to him exclusively. It would raise a presumption which might be rebutted by showing that no other owner was known; or by any other evidence which disproved the intention of discharging the other part-owners.[4]

So, if the note, negotiable or otherwise, of one part-owner were taken in payment, if the promisor refused to pay, the others would be liable, unless they could show a distinct bargain by which they were exonerated.[5]

[1] Wright *v.* Hunter, 1 East, 20; Thompson *v.* Finden, 4 Carr. & Payne, 158; Patterson *v.* Chalmers, 7 B. Mon. 595; James *v.* Bixby, 11 Mass. 440; Stewart *v.* Hall, 2 Dow. P. C. 29; Macy *v.* De Wolf, 3 W. & M. 193, 204; Carlisle *v.* The Eudora, 5 Louis. 15; Scottin *v.* Stanley, 1 Dall. 129.

[2] Leed *v.* Baring, Abbott on Shipping, 116, note; Fitch *v.* Sutton, 5 East, 230; 2 Parsons on Cont. 129, and cases there cited.

[3] Stewart *v.* Hall, 2 Dow. P. R. 29; James *v.* Bixby, 11 Mass. 37; Muldon *v.* Whitlock, 1 Cow. 290; Cox *v.* Reid, 1 Carr. & Payne, 602; Reed *v.* White, 5 Esp. 122. In Thompson *v.* Finden, 4 Carr. & Payne, 158, *Tindal*, C. J., said: "I should think an exclusive credit would be a giving up of the owners generally, and the making an exclusive bargain with the person who orders the goods, and an agreement to furnish them on his credit only." But there must be a voluntary giving up of the others; for, when all the part-owners are not known to the person giving credit to one, the others will not be discharged. Thomson *v.* Davenport, 9 B. & Cr. 78.

[4] In Thompson *v.* Finden, 4 Car. & Payne, 158, one part-owner defended against a claim for work and labor done to a vessel, on the ground that, in the plaintiff's books, the charge was against another part-owner alone. *Tindal*, C. J., said: "That would make no difference." But this remark must be taken with reference to that case, as the books would undoubtedly be evidence to show to whom the charge was made.

[5] The Bark Chusan, 2 Story, 455, 467. In Higgins *v.* Packard, 2 Hall, N. Y. 547, it was *held* that taking a note from one part-owner, does not discharge the others, unless expressly received for that purpose. And it seems that the giving of a receipt in full, is not alone sufficient evidence that it was so received. Schermerhorn *v.* Loines, 7 Johns. 311; Muldon *v.* Whitlock, 1 Cow. 290; Wyatt *v.* Margins of Hertford, 3 East, 147. But in Massachusetts and Maine, the taking of a promissory note from one part-

Commonly, the ship's husband, as the agent of all the owners for the management of the ship has long been called, is one of the part-owners. But he is not so necessarily. He may be appointed in writing or otherwise. His duties are, in general, to provide for the complete equipment and repair of the ship, and take care of her while in port; and see that she is furnished with all regular and proper papers; and make proper contracts for freight or passage, and collect the receipts, and make the disbursements proper on these accounts.[1] For these things he has all the necessary powers. But he cannot, without special power, insure for the rest,[2] nor buy a cargo for them,[3] nor borrow money, nor give up their lien on the cargo for the freight, nor delegate his authority.[4]

owner, would *primâ facie* discharge the others. Chapman *v.* Durant, 10 Mass. 49; French *v.* Price, 24 Pick. 13, 20; Descadillas *v.* Harris, 8 Greenl. 298; Wilkins *v.* Reed, 6 Greenl. 220; Newall *v.* Hussey, 18 Maine, 249. See also 2 Parsons on Cont. 136.

[1] Mr. Bell, in his work upon the Principles of the Law of Scotland, says: "The duties of the ship's-husband are: 1. To see to the proper outfit of the vessel in the repairs adequate to the voyage, and in the tackle and furniture necessary for a sea-worthy ship. 2. To have a proper master, mate, and crew for the ship, so that in this respect it shall be sea-worthy. 3. To see to the due furnishing of provisions and stores, according to the necessities of the voyage. 4. To see to the regularity of all the clearances from the custom-house, and the regularity of the registry. To settle the contracts, and provide for the payment of the furnishings, which are requisite in the performance of those duties. 5. To enter into proper charter-parties, or engage the vessel for general freight, under the usual conditions; and to settle for freight and adjust averages with the merchant; and, 6. To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters, and to keep regular books of the ship." 1 Bell, Comm. 410, § 428, (4th ed.); id. p. 504, (5th ed.)

[2] French *v.* Backhouse, 5 Burr. 2727; Bell *v.* Humphries, 2 Stark. 345; Patterson *v.* Chalmers, 7 B. Mon. 595; Foster *v.* United States Ins. Co. 11 Pick. 85; Turner *v.* Burrows, 5 Wend. 541; S. C. 8 Wend. 144; Robinson *v.* Gleadow, 2 Bing. N. C. 156. In Bell *v.* Humphries, a case where the managing owners had insured the whole vessel, Lord *Ellenborough* said: "As managing owners, they had a right to order everything to be done which was necessary for the ship; but a share in the ship was the distinct property of each individual part-owner, whose business it was to protect it by insurance, and the insurance of another could not be binding upon such proprietors, without some evidence importing an authority by them." See *infra*, n. 4. But one partner of a firm which owns a vessel, may effect insurance for all. Hooper *v.* Lusby, 4 Camp. 66.

[3] Hewett *v.* Buck, 17 Maine, 147. See *infra*, n. 4.

[4] Mr. Bell, in treating of the limitations of the powers of a ship's-husband, says: "1. That without special powers, he cannot borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them. 2. That, although he may, in the general case, levy the freight, which is, by the bills of lading, payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight, and give up the possession and lien over the cargo, unless it has been so settled by charter-party, or unless he has special authority to give such indulgence. 3. That, under general authority as ship's-husband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority. 4. That, as the power of the master to

Where he acts within his powers, a ship's husband binds all his principals, that is, all the part owners. But a third party may deal with him on his personal credit alone; and if the part-owners, believing this on good reason, settle their accounts with him accordingly, this third party cannot now establish a claim against them to their detriment.[1] If a ship's husband be not a part-owner, all the part-owners are liable to him *in solido*, or each for the whole amount.[2]

Whether a part-owner has a lien on the shares of other part-owners, or on the whole vessel, for advances or balances due on account of the vessel, is not certain on authority. Perhaps the current of adjudication may be adverse to this lien, permitting it only where the principles of the law of agency would give it. But there is not wanting authority, nor, as we think, strong reason for saying that this lien should belong to the part-ownership of a ship, as such.[3]

SECTION IV.

OF THE LIABILITIES OF MORTGAGEES.

A mortgagee of a ship, who is in possession, is, in general, lia-

enter into contracts of affreightment, is superseded in the port of the owners, so is it by the presence of the ship's-husband, or the knowledge of the contracting parties, that a ship's-husband has been appointed. 1 Bell, Comm. 411, § 429, (4th ed.); Id. 504, 505, (5th ed.) See also Campbell *v.* Stein, 6 Dow. 135; Williams *v.* Thomas, 6 Esp. 18.

[1] Reed *v.* White, 5 Esp. 122; Cheever *v.* Smith, 15 Johns. 276; Wyatt *v.* Marquis of Hertford, 3 East, 147.

[2] See *ante*, p. 336, n. 1, *et seq.*; Bowden *v.* Horne, 7 Bing. 716.

[3] If a part-owner, or stranger, as ship's husband, makes disbursements for a voyage, and comes into possession of the proceeds of that voyage, upon the general principles of the law of agency, he would seem to have a lien thereon, for his indemnity. 1 Bell, Comm. 503, 505; *Ex parte* Young, 2 Ves. & Beam. 242; Holderness *v.* Schackels, 8 B. & C. 612. There appears to be no decision which extends the lien of a ship's husband, who is not a part-owner. If the part-owners own the vessel as partners, or if they become partners for any particular adventure, then, undoubtedly, each one has a lien for his advances upon the partnership property. Mumford *v.* Nicoll, 20 Johns. 611; Coll. on Part., §§ 125, 1187, and note; Holderness *v.* Schackels, *supra*. But upon the question whether a part-owner, merely as such, has a lien for his advances, there is a diversity in the decisions. In England, it is now settled, that there is no such lien. *Ex parte* Young, 2 Ves. & Bea. 242; *Ex parte* Harrison, 2 Rose, 76. This rule was followed in Braden *v.* Gardner, 4 Pick. 456; Merrill *v.* Bartlett, 6 Pick. 46; Patton *v.* Schooner Randolph, Gilpin, 457; and by Chancellor *Kent*, in Nicoll *v.* Mumford, 4 Johns. Ch. 522. But in Doddington *v.* Hallet, 1 Ves. Sen. 407, Lord *Hardwicke* held that there was a lien in such cases, and this decision, although overruled in England by Lord *Eldon*, in the cases just cited, was followed in the Court of Errors in New York, in Nicoll *v.* Mumford, 20 Johns. 611, and in Seabrook *v.* Rose, 2 Hill, Ch. (S. Car.) 553.

ble in the same way as an owner.[1] But if he has not taken possession, he is not liable for supplies or repairs, merely on the ground that his security is strengthened by whatever preserves or increases the value of the vessel. Nor can he be made liable, except by some act or words of his own, which show that credit was *properly* given to him, or that he has come under a valid engagement to assume this responsibility.[2]

SECTION V.

OF THE CONTRACT OF BOTTOMRY.

By this contract, a ship is hypothecated as security for money borrowed. The form of this contract varies in different places, and, indeed, in the same place. Its essentials are: First, that the ship itself is bound for the payment of the money.[3] Second, that

[1] Miln *v.* Spinola, 4 Hill, 177; S. C. 6 Hill, 218; Champlin *v.* Butler, 18 Johns. 169. In Tucker *v.* Buffington, 15 Mass. 477, the defendants had taken an absolute bill of sale of a vessel, represented her as their property at the custom-house, taken out a new certificate of enrolment in their own names, and caused the name of the place of residence of the former owners to be erased from the stern, and the name of their own place of residence to be substituted. They were held liable for repairs, although there was a written defeasance, and they had received none of the earnings of the vessel, nor acted in any way as owners. *Parker*, C. J., said: "A tradesman, who intended to work on the credit of the owners of the vessel, would have no means of conjecturing any one to be owner, but him in whose name the vessel was enrolled; and this fact, together with the alteration on the stern, would give a better indication of the ownership than actual possession of the vessel. For, in almost all cases, those who own are not those who are employed about the vessel."

[2] M'Intyre *v.* Scott, 8 Johns. 159; Champlin *v.* Butler, 18 Johns. 169; Phillips *v.* Ledley, 1 Wash. C. C. 226; Brooks *v.* Bondsey, 17 Pick. 441; Cutler *v.* Thurlo, 20 Maine, 213; Lord *v.* Ferguson, 9 N. H. 380; Fisher *v.* Willing, 8 Serg. & R. 118; Hesketh *v.* Stevens, 7 Barb. 488; Cordray *v.* Mordecai, 2 Rich. 518; M'Carter *v.* Huntington, 15 Johns. 298. In Brooks *v.* Bondsey, *Shaw*, C. J., said: We think it now too clear to admit of a question, that a mortgagee of a vessel, not in the possession or employment of the vessel, not having ordered or authorized supplies and repairs, and not holding himself out to the world as an owner,—as in the case of Tucker *v.* Buffington, 15 Mass. 477, is not liable for the supplies or repairs furnished to such vessel." In Starr *v.* Knox, 2 Conn. 215, it was held, that if a person is registered as absolute owner, and credit is given for supplies on the strength of that, he will be liable, although he is in fact a mortgagee. But see Ring *v.* Franklin, 2 Hall, N. Y. 1; Duff *v.* Bayard, 4 W. & S. 240. The question whether a mortgagee, not in possession, was liable for repairs, &c., seems to have been unsettled in England at one time. Westerdell *v.* Dale, 7 T. R. 306; Tucker *v.* Buffington, *supra*, per *Parker*, C. J. But it seems now to be determined in accordance with the above doctrine. Jennings *v.* Griffiths, Ryan & Moody, 42; Briggs *v.* Wilkinson, 7 B. & C. 30.

[3] In Blaine *v.* The Charles Carter, 4 Cranch, 328, *Chase*, J., said: "A bottomry bond made by the master, vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her, which may be enforced, with all the expedition and efficiency of the admiralty process." See also Johnson *v.* Shippen, 2 Ld. Raym.

the money is to be repaid only in case that the ship performs a certain voyage, and arrives at its terminus in safety; or, as it is sometimes provided in modern bottomries, in case that the ship is in safety on a certain day;[1] therefore if the ship is lost before the termination of the voyage or the expiration of the period, no part of the money is due, or, as is sometimes said, the whole debt is paid by the loss.[2] As the lender thus consents that the repayment of the money shall depend upon the safety of the ship, he has a legal right to charge "marine interest," or as much more than legal interest as will serve to cover his risk.[3]

The lender may require, and the borrower pay more than lawful interest on a bottomry bond, without usury. And it has been said that maritime interest, or more than legal interest, must be charged by the contract, or it is not a loan on bottomry.[4] But this, we think, is not accurate. We hold that maritime interest may always be waived by the lender; for such interest, however usual, or nearly universal, is not of the essence of the contract.[5]

984; Johnson *v.* Greaves, 2 Taunt. 344; United States *v.* Delaware Ins. Co. 4 Wash. C. C. 418.

[1] The Brig Draco, 2 Sumn. 157, 191; Thorndike *v.* Stone, 11 Pick. 183. The case of the Brig Draco deserves careful attention, as containing a most elaborate discussion upon the return of bottomry bonds, in the light of the general maritime law.

[2] The Atlas, 2 Hagg, 48; Bray *v.* Bates, 9 Metc. 237; The Brig Draco, 2 Sumn. 157; Leland *v.* The Medora, 2 W. & M. 92, 107; Jennings *v.* Ins. Co. of Penn. 4 Binn. 244; Rucher *v.* Conyngham, 2 Pet. Adm. 295; The Mary, 1 Paine, C. C. 671; Greeley *v.* Waterhouse, 19 Maine, 9; Stanibank *v.* Fenning, 11 C. B. 51; 6 Eng. L. & Eq. 412. In Bray *v.* Bates, *Hubbard*, J., said: "Bottomry is a contract by which the ship, or, as it used to be said, the keel or bottom of the ship, is pledged to secure the payment of money borrowed by the owner to fit her for sea, repair her, &c.; and the agreement is, that if the ship is lost by any of the perils enumerated in the contract, the lender loses his money; but if the ship arrives safely, or is in safety at the termination of the time stipulated for the repayment of the loan, he is to receive back his principal sum and a marine interest, at the rate agreed upon, although it exceeds the legal interest; and in this event, the ship and the borrower himself are equally liable to the lender."

[3] In The Atlas, 2 Hagg, 58, Lord *Stowell* said: "If the ship arrived safe, the title to repayment became vested; but if the ship perished *in itinere*, the loss fell entirely upon the lender. Upon that account, the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and therefore was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was therefore entitled to charge his *pretium periculi*, his valuation of the danger to which he was exposed. A contract similar to this upon the cargo is called *respondentia*, but is of rarer occurrence."

[4] Leland *v.* Medora, 2 W. & M. 92, 107; The Mary, 1 Paine, C. C. 671.

[5] In The Emancipation, 1 W. Rob. 124, 130, Dr. *Lushington* said: "I am aware that it is not absolutely necessary that a bottomry bond should carry maritime interest, and that a party may be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and when the argument in support of the bond is, that the advance of the money was attended with risk, it is a material circumstance, that only an ordinary rate of interest should be demanded. It is impossible to

If the interest be not expressed in the contract, it will generally be presumed to be included in the principal.[1]

If, by the contract, the lender takes more than legal interest, and yet the money is to be paid to him, although the ship be lost, it is not a contract of bottomry, and is subject to all the consequences of usury.[2] But the lender may take security for his debt and marine interest, additional to the ship itself, provided the security is given, like the ship itself, to make the payment certain when it becomes due by the safety of the ship, but is wholly avoided if the ship be lost.[3]

The most common contracts of bottomry are those entered into by the master in a foreign port, where money is needed and cannot otherwise be obtained.[4] Therefore the security goes with the ship, and the debt may be enforced, as soon as it is payable, against the ship, wherever the ship may be.[5] In Europe, contracts of bottomry are seldom made otherwise now.[6] But in this

conceive that any merchant, carrying on his business with ordinary care and caution, would be content to divest himself of all security for the loan of his money but a bottomry bond, and ask no greater emolument than the ordinary rate of 6*l.* per cent., if the repayment of such a loan was to depend upon the safe arrival of the vessel at the port of her destination, after performing such a voyage."

[1] The Mary, 1 Paine, C. C. 671.

[2] The Atlas, 2 Hagg, 58, 73, and cases cited *ante*, p. 340, n. 2.

[3] Thorndike *v.* Stone, 11 Pick. 183. In the late case of Steinbank *v.* Shepard, 13 C. B. 418; 20 Eng. L. & E. 547, *Parke*, B., said: "We must not be supposed to intimate a doubt that a bottomry bond may not be given at the same time with, or as a collateral security for, bills of exchange drawn on the owner. This was clearly laid down by Dr. Lushington, in the case of The Emancipation, 1 W. Rob. 124, on the authority of many cases. If necessaries can be provided on the personal credit of the owners, or upon a bill of exchange drawn by the master upon them, a bottomry bond cannot afterwards be given to secure the same debt, because the necessity of hypothecating the ship is the condition of the master's authority to do so. The Augusta, 1 Dod. Adm. Rep. 283. But bills of exchange may be drawn on account of the supply, and a bottomry bond given, at the same time, as a collateral security,—in this sense, that, if the bills of exchange are honored—The Nelson, 1 Hagg, Adm. 174—that is, accepted and paid, if they require acceptance, or paid if they do not, as the case may be—the bottomry is discharged; and, though the ship arrive, the maritime interest is not payable; if dishonored, the amount is payable on arrival, by means of the remedy against the ship, and in that case, with maritimal interest. The Catherine, 3 Hagg, Adm. Rep. 253; The Emancipation, 1 W. Rob. 129; The Atlas, 2 W. Rob. 502. So that, in that event, if the bills are accepted, the creditor would have a double remedy—one against the person of the debtor, and one against the ship. But the law forbids the creditor to have a direct remedy on the bond itself against the owner as well as the ship, and it makes it essential to the remedy against the ship, that it should be contingent on its safe arrival; and this, whether maritime interest is required or not." See also The Hunter, Ware, 253; Bray *v.* Bates, 9 Metc. 237; The Jane, 1 Dods. 466.

[4] As to the authority of the master to enter into this contract, see *infra*.

[5] See *ante*, p. 339, n. 3.

[6] In England, the admiralty jurisdiction extends to bottomry bonds when made abroad for the necessities of the voyage, whether made by the master or the owner. Duke of Bedford, 2 Hagg. 294. But it seems that it does not extend to those made by the owner in the home port. Abbott on Shipping, p. 153; Johnson *v.* Shippen, 2

country, these are frequently made by the owner himself, in the home port. And sometimes they are nothing else than contrivances to get more than legal interest. Thus, if A borrows $20,000 on his ship for one year, at fifteen per cent. interest, conditioned that if the ship be lost the money shall not be paid, and the lender insures the ship for three per cent., he gets twelve per cent. interest, which is twice the legal interest, and yet incurs no risk.[1] If such a contract were obviously and certainly merely colorable, and a pretence for getting usurious interest, the courts would probably set it aside; but it might be difficult to show this.[2]

If the money is payable at the end of a certain voyage, and the owner or his servant, the master, terminate the voyage sooner,—either honestly, from a change in their plan, or dishonestly, by intentional loss or wreck,—the money becomes at once due.[3]

In admiralty, and, it may be supposed, in common-law courts, a bottomry bond, made abroad, would override all other liens or engagements except the claim for seamen's wages.[4] The reason is that a bottomry bond is supposed to be made from necessity, and to have provided the only means by which the ship could be brought home.[5] For the same reason, a later bond is sustained as against an earlier, and the last against all before it.[6] It is possible, however, that a distinction might be taken between liens

Ld. Raym. 983, per *Holt*, C. J.; Busk *v.* Fearon, 4 East, 319, per *Lawrence*, J.; The Barbara, 4 Rob. 1. But see The Brig Draco, 2 Sumn. 157, 176, per *Story*, J.

[1] The question has been raised whether the admiralty jurisdiction of the United States courts extends to cases of this nature. In the case of The Draco, 2 Sumn. 157, Mr. Justice *Story*, after much consideration, decided the question in the affirmative. See also Wilmer *v.* The Smilax, 2 Pet. Adm. 295; The Hull of a New Ship, Daveis, 199; Cornish *v.* Murphy, 2 Bro. Civ. & Adm. Law, App. p. 530; The Sloop Mary, 1 Paine, C. C. 671. But see Hurry *v.* The John & Alice, 1 Wash. C. C. 293, and Blaine *v.* The Charles Carter, 4 Cranch, 328, per *Chase*, J.

[2] Thorndike *v.* Stone, 11 Pick. 183, per *Putnam*, J.

[3] The Brig Draco, 2 Sumn. 157; 2 Emerig. Traité á la Grosse, ch. 8, § 4.

[4] The Aline, 1 W. Rob. 111; Madonna D'Idra, 1 Dods. 37, 40; The Sydney Cove, 2 Dods. 1, 13; The Virgin, 8 Pet. 538. In the case of The Madonna D'Idra, Sir *W. Scott* said: "It must be taken as the universal law of this court, that mariners' wages take precedence of bottomry bonds. These are sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds, as a security for his wages." See also The Kammerhevie Rosenkrants, 1 Hagg. 62. But in The Mary Ann, 9 Jurist, 94, Dr. *Lushington* expressed an opinion that wages, earned subsequently to a bottomry bond, would be entitled to priority, but that wages, earned antecedently, would not. In The Selina, 2 Notes of Cases, 18, such was held to be the rule, as to the lien or salvage.

[5] Hence the privilege of priority is confined to bonds given under the pressure of necessity in a foreign port. Rhadamanthe, 1 Dods. 201.

[6] The Sydney Cove, 2 Dods. 1; The Betsey, 1 Dods. 289; The Eliza, 3 Hagg. 87.

created by contract and those arising from tort, and that a lien by bottomry would be preferred over all the former, but not the latter.[1]

The lien of bottomry depends in no degree on possession; but an unreasonable delay in enforcing it will destroy the lien.[2]

There may be a mortgage of a ship, as of any chattel, as we have already said; but this is a very different thing from a loan on bottomry. We have seen that the statute of 1850 requires mortgages of ships to be recorded, but does not require that bottomry bonds should be. There is excellent reason for this distinction in reference to bottomry bonds made abroad, but none as to those made at home.[3]

SECTION VI.

OF THE EMPLOYMENT OF A SHIP BY THE OWNER.

An owner of a ship may employ it in carrying his own goods, or those of another. He may carry the goods of others, while he himself retains the possession and direction of the ship; or he may lease his ship to others, to carry their goods. In the first case, he carries the goods of others on freight; in the second, he lets his ship by charter-party. We shall consider first the carriage of goods on freight.

He may load his ship as far as he can with his own goods, and then take the goods of others to fill the vacant space; or he may put up his ship as "a general ship," to go from one stated port to another, and to carry the goods of all who offer.

It may be remarked that the word "freight" is used in different ways; sometimes, to designate the goods or cargo that is car-

[1] In the case of The Aline, 1 W. Rob. 111, a collision occurred, and the vessel, to the negligence of whose crew the collision was owing, put into Cowes for repairs. D., without knowledge of the claim against her for the collision, advanced money for repairs, under an agreement of the master to execute a bottomry bond. *Held*, that D. was entitled to priority only to the extent of the increased value of the vessel, arising from the repairs. See Law Reporter of May, 1853, p. 5, "On the Peculiarities of Maritime Liens."

[2] The Rebecca, 5 Rob. 102; Blaine *v.* The Charles Carter, 4 Cranch, 328.

[3] In The Brig Draco, 2 Sumn. 157, 180, it was held, that the nature of a bottomry bond did not require that the money loaned should be for the necessities or the use of the ship. There certainly seems to be no reason why a loan made for general purposes in a home port, secured by a bottomry bond, should have any privileges over a loan secured by mortgage.

ried, and there is some reason for believing that this was its earliest sense;[1] sometimes to denote the money which the shipper of the goods pays to the owner of the ship, for their transportation. And not unfrequently, when the word is used in this latter sense, the word money is added, as the phrase "freight money" leaves no question as to what is meant. Sometimes a ship-owner who lets the whole burden of his ship to another, is said to carry the shipper's goods on freight. But the most common meaning of the word, especially in law proceedings, is the money earned by a ship not chartered, for the transportation of the goods; and in this sense we shall use it.[2]

Nearly the whole law of freight grows out of the ancient and universal principle that the ship and the cargo have reciprocal duties or obligations towards each other, and are reciprocally pledged to each other for the performance of these duties. In other words, not only is the owner of the ship bound to the owner of the cargo, as soon as he receives it, to lade it properly on board, take care of it while on board, carry it in safety, so far as the seaworthiness of the ship is concerned, to its destined port, and there deliver it, all in a proper way, but the ship itself is bound to the discharge of these duties. That is to say, if, by reason of a failure in any of these particulars, the shipper of the goods is damnified, he may look to the ship-owner for indemnity; but he is not obliged to do so, because he may proceed by proper process against the ship itself.[3] This lien, like that of bottomry, is not dependent upon possession, but will be lost by delay, especially if the vessel passes into the hands of a purchaser for value without notice.[4] On the other hand, if the ship discharges all its

[1] Bright *v.* Cowper, 1 Brownlow, 21, (A. D. 1620.) The report of that case commences as follows: "Action of covenant brought upon a covenant made by the merchant with the master of a ship, that if he would bring his freight to such a port, he would pay him such a sum."

[2] See Pothier, Traité de Charte-parties, n. 1; Valin, vol. i. p. 36. In policies of insurance, the word freight frequently designates the increased value accruing to a ship-owner from the transportation of his own goods. Flint *v.* Flemyng, 1 B. & Ad. 45; Wolcott *v.* Eagle Ins. Co. 4 Pick. 429. See also Clark *v.* Ocean Ins. Co. 16 Pick. 289.

[3] Cleirac, Les Us et Conturnes de la Mer, p. 72; Pothier, Charte-partie, No. 48. It seems that in England the admiralty courts have no jurisdiction to enforce the lien upon the ship in such cases. Abbott on Shipping, 127; The Volunteer, 1 Sumn. 551. But in this country a suit to enforce this lien, both on the ship and cargo, is held to come within the maritime jurisdiction. The Volunteer, *supra;* The Rebecca, Ware, 188; The Phœbe, id. 263; The Waldo, Daveis, 161; The Brig Casco, id. 184; The Robert Morris *v.* Williamson, 6 Ala. 50; Clark *v.* Barnwell, 12 How. 272; Rich *v.* Lambert, id. 347.

[4] The maritime lien on the ship does not include or require possession. The word

duties, the owner may look to the shipper for the payment of his freight; but is not obliged to do so, because he may keep his hold upon the goods, and refuse to deliver them until the freight is paid.[1]

The party who sends the goods may or may not be the owner of them. And he may send them either to one who is the owner, for whom the sender bought them, or to one who is only the agent of the owner. In either of these cases, the sender is called the consignor of the goods, and the party to whom they are sent is called the consignee. The sending them is called the consigning or the consignment of them; but it is quite common to hear the goods themselves called the consignment.

The rights and obligations of the ship-owner and the shipper are stated generally in an instrument of which the origin is lost in its antiquity, and which is now in universal use among commercial nations, with little variety of form. It is called the Bill of Lading.[2] It should contain the names of the consignor, of the consignee, of the vessel, of the master, of the place of departure, and of the place of destination; also the price of the freight, with primage and other charges, if any there be, and either in the body of the bill or in the margin, the marks and numbers of the things shipped, with sufficient precision to designate and identify them.

is used in maritime law not in the strict legal sense in which we understand it in courts of common law, in which there could be no lien where there was no possession, actual or constructive; but to express, by analogy, the nature of claims which neither presuppose nor originate in possession. Harmer *v.* Bell, 22 Eng. Law and Eq. 72. But it will nevertheless be lost if not enforced without unreasonable delay, especially if the vessel has come into the hands of a *bonâ fide* purchaser without notice of the lien. The Bark Chusan, 2 Story, 455, 468; Packard *v.* The Louisa, 2 W. & M. 48.

[1] The Schooner Volunteer, 1 Sumn. 551, 569; Drinkwater *v.* The Brig Spartan, Ware, 149; Van Bokkelin *v.* Ingersoll, 5 Wend. 315; Certain Logs of Mahogany, 2 Sumn. 589; Molloy, Lib. 2, ch. 4, § 12; Beawes, Lex Merc., tit. Freight; Anon. 12 Mod. 447, 511. This lien is undoubtedly derived from the maritime law, and was in its origin like the "privilegium" of the civil law, a claim which follows the goods wherever they go. It is now usually construed as a right to retain possession of the goods until the freight is paid; and if the possession is parted with, the lien is lost, or considered as waived. The Schooner Volunteer; Certain Logs of Mahogany; Van Bokkelin *v.* Ingersoll; Packard *v.* The Louisa, 2 W. & M. 48, 58; Perkins *v.* Hill, 2 W. & M. 158, 166; Phillips *v.* Rodie, 15 East, 547, 554. In the last case, Lord *Ellenborough* said: "What is a lien for freight, but a right to detain the goods on board until the freight which has been actually earned upon them, which is capable of being calculated and ascertained, has been paid, and where the owner of the goods knows what he is to tender?" The admiralty cases above cited sustain the same doctrine. But where a part of a lot of goods belonging to one person has been delivered, there is a lien on the remainder for the freight on the whole. Sodergren *v.* Flight, 6 East, 622. Delivery of a part is not a waiver of the lien on the residue. Moller *v.* Young, 30 E. L. & E. 345.

[2] For forms of Bills of Lading, see Grant *v.* Norway, 10 C. B. 665; Renteria *v.* Ruding, 1 Mood. & Malk. 511.

And it should be signed by the master of the ship, who, by the strict maritime law, has no authority to sign a bill of lading until the goods are actually on board.[1] There is some relaxation of this rule in practice; but it should be regretted and avoided.

Usually one copy is retained by the master, and three copies are given to the shipper; one of them he retains, another he sends to the consignee with the goods, and the other he sends to the consignee by some other conveyance.

The delivery promised in the bill is to the consignee, or his assigns; and the consignee may designate his assigns by an indorsement signed by him on the bill, and order the delivery to them, or the consignee may indorse the bill in blank, and any one who acquires an honest title to it may write over the signature an order of delivery to himself.[2] It is held that the consignee has this power, if such be the usage, even if the word "assigns" be omitted.[3] Such indorsement not only gives the indorsee a right to demand the goods, but passes to him the property in the goods.[4] It is said, however, that if the goods are refused, an action on the bill must be brought in the name of the original consignee.[5]

As the bill of lading is evidence against the ship-owner, as to the reception of the goods, and their quantity and quality, it is common to say "contents unknown," or "said to contain, &c.[6]

[1] Grant *v.* Norway, 10 C. B. 665; 2 Eng. L. & Eq. 337; Hubbersty *v.* Ward, 8 Exch. 330; 18 Eng. L. & Eq. 551. See also, Rowley *v.* Bigelow, 12 Pick. 307.

[2] In Chandler *v.* Sprague, 5 Metc. 306, *Shaw*, C. J., said: "Ordinarily the name of a consignee is inserted; and then such consignee, or his indorsee, may receive the goods and acquire a special property in them. Sometimes the shipper, or consignor, is himself named as consignee, and then the engagement of the ship-owner or master is, to deliver them to him or his assigns. Sometimes no person is named, the name of the consignee being left blank, which is understood to import an engagement on the part of the master to deliver the goods to the person to whom the shipper or consignor shall order the delivery, or to the assignee of such person." See Lickbarrow *v.* Mason, 2 Term, 63; 6 East, 21; 1 Smith, Lead. Cases, 388.

[3] Renteria *v.* Ruding, 1 Mood. & Malk. 511; 1 Parsons on Cont. 239.

[4] Lickbarrow *v.* Mason, 2 Term, 63; 1 Smith, Lead. Cases, 388; Chandler *v.* Belden, 18 Johns. 157; Chandler *v.* Sprague, 5 Metc. 306; 1 Parsons on Cont. 239.

[5] See Thompson *v.* Downing. 14 M. & W. 403, an action was brought on a bill of lading, in the name of the consignee. It was *held*, that the action would not lie. *Alderson*, B. said: "Because in Lickbarrow *v.* Mason, a bill of lading was held to be negotiable, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only." See also, Dows *v.* Cobb, 12 Barb. 310.

[6] In Clark *v.* Barnwell, 12 How. 272, 284, in the bill of lading, after the usual clause that the goods were shipped in good order, there was added, "contents unknown." It was held, "that the acknowledgment of the master as to the condition of the goods

But without any words of this kind, the bill of lading is not conclusive upon the ship-owner, in favor of the shipper, who may show that its statements were erroneous through fraud or mistake.[1] But the ship-owner, or master, is bound much more strongly, and perhaps conclusively, by the words of the bill of lading, in favor of a third party, who has bought the goods for value and in good faith, on the credit of the bill of lading.[2]

The law-merchant gives to the ship, as we have seen, a lien on the goods for the freight.[3] The master cannot demand the freight without a tender of the goods at the proper time, in the proper way, to the proper person, and in a proper condition;[4] but then the consignee is not entitled to the goods without paying freight. The law gives this lien, whether it be expressed or not.[5] But it may be expressly waived. The bill of lading, or other evidence, may show the agreement of the parties, that the goods should be delivered first, and the freight not be payable until a certain time afterwards; and such an agreement is in general a waiver of the lien.[6]

when received on board, extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes."

[1] Barrett *v.* Rogers, 7 Mass. 297; Benjamin *v.* Sinclair, 1 Bailey, 174; Hastings *v.* Pepper, 11 Pick. 41; O'Brien *v.* Gilchrist, 34 Maine, 554; Babcock *v.* May, 4 Ohio, 334; Bates *v.* Todd, 1 M. & Rob. 106; Knox *v.* The Ninetta, Crabbe, 534.

[2] "As between the shipper of the goods and the owner of the vessel, a bill of lading may be explained as far as it is a receipt; that is, as to the quantity of the goods shipped, and the like; but as between the owner of the vessel and an assignee, for a valuable consideration, paid on the strength of the bill of lading, it may not be explained," — Per *Edmonds*, J., in Dickerson *v.* Seelye, 12 Barb. 102; Howard *v.* Tucker, 1 B. & Ad. 712. See also, Berkley *v.* Watling, 7 Ad. & El. 29. But where a bill of lading was signed by the master before the goods were shipped, it was held not to be binding upon the owner, even in the hands of an indorsee for value. Grant *v.* Norway, 10 C. B. 665; 2 Eng. L. & Eq. 337; Hubbersty *v.* Ward, 8 Exch. 330; 18 Eng. L. & Eq. 551. But as far as a bill of lading contains a contract, and not an acknowledgment, it is governed by the ordinary rules of construction, and cannot be varied by parol evidence. 2 Parsons on Cont. 67; Babcock *v.* May, 4 Ohio, 334; Wolfe *v.* Myers, 3 Sandf. 7; Ward *v.* Whitney, 3 Sandf. 399.

[3] See *ante*, p. 345, n. 1.

[4] Lane *v.* Penniman, 4 Mass. 91; Certain Logs of Mahogany, 2 Sumn. 589; Phelps *v.* Williamson, 5 Sandf. 578. In Bradstreet *v.* Baldwin, 11 Mass. 229, the cargo was seized by the government for the default of the shipper. The court held, that, "if there was evidence of a readiness, on the part of the plaintiffs, to deliver the cargo to the defendant, and the actual delivery and discharge of it had been prevented by the neglect of [the defendant to receive it, or if the delivery was intercepted by an attachment, or seizure for a default of the defendant, the plaintiffs would be entitled upon this evidence, as they would be upon proving an actual discharge and delivery of the cargo." See, also, Palmer *v.* Lorillard, 16 Johns. 348.

[5] See *ante*, p. 345, n. 1.

[6] In the Schooner Volunteer, 1 Sumn. 551, 569, *Story*, J., said: "In general, it is well known, that, by the common law, there is a lien on the goods shipped, for the freight due thereon, whether it arrive under a common bill of lading, or under a charter-party. But then this lien may be waived by consent; and in cases of charter-parties,

At common law this agreement to deliver the goods before payment of freight, is destructive of the lien. But in admiralty this lien would, we think, be considered rather as the privilegium of the civil law, than the lien of common law; and therefore not to be so entirely dependent on the mere possession. Unless the ship-owner intended to give up his security on the goods, a court of admiralty would be disposed so to construe such an agreement as to give the consignee possession of the goods, for a temporary purpose, as to ascertain their condition, or, possibly, that he might offer them in the market, and by an agreement to sell, raise the means of paying the freight; and yet would preserve for the master his security upon the goods for a reasonable time, unless, in the mean time, they should actually become, by sale, the property of a *bonâ fide* purchaser.[1]

The contract of affreightment is entire; therefore no freight is earned unless the whole is earned, by carrying the goods quite to the port of destination.[2] If by wreck, or other cause, the transportation is incomplete, no absolute right of freight grows out of it. We say no absolute right, because a conditional right of freight does exist. To understand this, we must remember that as soon as the ship receives the goods, it, on the one hand,

it often becomes a question, whether the stipulations are, or are not, inconsistent with the existence of the lien. For instance, if the delivery of the goods is by the charter-party to precede the payment, or security, of payment of freight; such a stipulation furnishes a clear dispensation with the lien for freight, for it is repugnant to it, and incompatible with it." But it was held in that case, that a clause providing for the payment of freight, "within ten days after her" (the schooner's) "return to Boston, or, in case of loss, to the time she was last heard of," was not a waiver, because the law allows fifteen days after arrival, for entry and discharge of cargo. So in the case of Certain Logs of Mahogany, 2 Sumn. 589, a clause making the freight "payable in five days after her return to, and discharge in Boston," was no waiver of the lien, on the ground, among others, that "discharge" did not necessarily mean delivery. And *Story*, J., remarked, that the lien was "favored in law, and ought not to be displaced without a clear and determined abandonment of it." In Crawshay *v.* Homfray, 4 B. & Ald. 50, *Best*, J., said: "The principle has been truly stated, that unless the special agreement be inconsistent with the right of lien, it will not destroy it." See also, Pinney *v.* Wells, 10 Conn. 104. The general doctrine that a special contract, inconsistent with the right to a lien, is a waiver of it, is supported, also, in Chandler *v.* Belden, 18 Johns. 157; Pickman *v.* Woods, 6 Pick. 248; Chase *v.* Westmore, 5 Maule & Sel. 180; Tate *v.* Meek, 8 Taunt. 280; Horncastle *v.* Farran, 3 B. & Ald. 497.

[1] See the preceding note.

[2] Vlierboom *v.* Chapman, 13 M. & W. 238; Halwerson *v.* Cole, 1 Spears, 321; Hurtin *v.* Union Ins. Co. 1 Wash. C. C. 530; The Nathaniel Hooper, 3 Sumn. 542. But if, on account of the perils of the sea, only a part of the goods have been brought to the port of destination, it seems that the owner is entitled to a proportional part of the freight, if those goods are accepted. Luke *v.* Lyde, 2 Burr. 882; Post *v.* Robertson, 1 Johns. 24; The Nathaniel Hooper, 3 Sumn. 542. But see the dissenting opinion of *Livingston*, J., in Post *v.* Robertson. But, in such a case, nothing can be recovered under the special agreement to carry all the goods, but the action must be on the implied *assumpsit*. Post *v.* Robertson; Bright *v.* Cowper, 1 Brownl. 21.

comes under the obligation of carrying them to their destination, and on the other, at the same time, (or, perhaps, only on breaking ground and beginning the voyage,) acquires the right of so carrying them. Therefore, if a wreck or other interruption intervenes, the ship-owner has the right of transshipping them, and sending them forward to the place of their original destination. When they arrive there, he may claim the whole freight originally agreed on; but if forwarded in the original ship, he can claim no more; for the extra cost of forwarding the goods is his loss.[1] He not only may, but must send forward the goods, at his own cost, if this can be done by means reasonably within his reach.[2] He is not, however, answerable for any delay thus occurring, or for any damage from this delay. The shipper himself, by his agent, may always reclaim all his goods, at any intermediate port or place, on tendering all his freight; because the master's right of sending them forward is merely to earn his full freight. If, therefore, the goods are damaged and need care, and the master can send them forward at some time within reasonable limits, and insists upon his right to do so, the shipper can obtain possession of his goods only by paying full freight.[3] If, however, the mas-

[1] In Rosetto *v.* Gurney, 11 C. B. 176, 188, 7 Eng. L. & Eq. 461, *Jervis*, C. J., referring to a case where the cargo was detained by perils of the sea at an intermediate port, said: "If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master transships, because the original ship is irreparably damaged, without considering whether he is bound to transship, or merely at liberty to do so, it is clear that he transships to earn his full freight; and so the delivery takes place upon the original contract. It may happen that a new bottom can only be obtained at a freight, higher than the original rate of freight. It does not seem to have been settled, whether, in that case, the ship-owner may charge the cargo with the additional freight. By the French law, he may do so, and as a consequence of that rule, the increased freight would be an average loss, to be added to the other items. See Shipton *v.* Thornton, 9 Ad. & Ell. 314." It was then held, that the increased freight should be an item in the average loss, thus holding the shipper responsible for it. The same rule has been adopted in the American courts. Mumford *v.* The Commercial Ins. Co. 5 Johns. 262; Searle *v.* Scovell, 4 Johns. Ch. 218; Hugg *v.* Augusta Ins. and Banking Co. 7 How. 595, 609; 3 Kent's Com. 212. But see Shultz *v.* Ohio Ins. Co. 1 B. Mon. 339.

[2] In England it does not appear to be settled whether the master is bound to carry on the goods in such a case, or whether he is merely at liberty to do so. Rosetto *v.* Guerney, 11 C. B. 176, 188; 7 Eng. L. & Eq. 461; Shipton *v.* Thornton, 9 Ad. & Ell. 314. But in this country it is held to be the duty of the master to transship, "if upon the whole it should seem reasonable, taking into view the nature of the voyage, and the time, expense, and risk of the transportation to the port of destination." Bryant *v.* Commonwealth Ins. Co. 6 Pick. 131; Shieffelin *v.* The New York Ins. Co. 9 Johns. 21; Saltus *v.* Ocean Ins. Co. 12 Johns. 107; Treadwell *v.* Union Ins. Co. 6 Cow. 270. See also, Hugg *v.* Augusta Ins. and Banking Co. 7 How. 595, 609, per *Nelson*, J.; 3 Kent's Com. 213.

[3] The rule is thus stated by Lord *Mansfield*, in Luke *v.* Lyde, 2 Burr. 882, 887: "If a freighted ship becomes accidentally disabled on its voyage, (without the fault of the master,) the master has his option of two things; either to refit it, (if that can be

ter tender the goods there, to the shipper, and the shipper there receives them, this is held to sever the contract by agreement, and now what is called a freight *pro rata itineris* is due. This is quite a common transaction. Difficult questions sometimes arise as to what is a reception of the goods. The rights of the master and of the shipper are antagonistic, and neither must be pressed too far. The master must not pretend to hold them for forwarding, to the detriment of the goods or their value, when he cannot forward them, but merely uses his right to coerce a payment of full freight. And the shipper must not refuse to receive the goods, when the master can do no more with them, and offers their delivery in good faith. The questions of this kind, so far as they are difficult, are generally questions of fact. Courts tend to this result; where the goods cannot be forwarded by the master without unreasonable effort or cost, or where they need measures for their preservation which he cannot take, and they come into possession of the shipper, and their original value has been increased by the transportation to that place — the ship-owner is held to be entitled to a proportionate share of the freight. Still, as matter of law, it seems to be settled, that if the master certainly will not, or certainly cannot, carry or send the goods forward, the shipper is entitled to them without any payment of freight. So, the shipper may always refuse to receive them, and then, under no circumstances, is freight *pro rata* payable, on the general ground that the original contract is at end, and no new one

done within convenient time,) or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. And so it was determined in the House of Lords, in the case of Lutwidge and How *v.* Gray et al." See report of Lutwidge *v.* Gray, in Luke *v.* Lyde, and Clark *v.* The Mass. Ins. Co. 2 Pick. 104; Jordan *v.* Warren Ins. Co. 1 Story, 342; M'Gaw *v.* Ocean Ins. Co. 23 Pick. 405; Griswold *v.* N. Y. Ins. Co. 3 Johns. 321; Bradhurst *v.* Columbian Ins. Co. 9 Johns. 17. What will be a reasonable time to allow the master for repairs must depend upon the circumstances of each case. In Clark *v.* The Mass. Ins. Co., two months was allowed, where the vessel, on a voyage from Richmond to Nice, with a cargo of tobacco, was driven into Kennebunk, in Maine. See remarks of *Putnam*, J., on this question in that case. In the case of The Nathaniel Hooper, 3 Sumn. 542, 555, *Story*, J., said: "And I think the whole of the cases, in which the full freight is, upon the ordinary principles of the commercial law, due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement that the non-arrival has been occasioned by no default or inability of the carrier-ship, but has been occasioned by the default or waiver of the merchant shipper." The cases of The Racehorse, 3 Rob. 101; The Martha, 3 Rob. 106 note; The Hoffmung, 6 Rob. 231; were held to be of doubtful authority, unless supported upon the ground that they were prize cases, and for that reason came under "a very peculiar and extensive jurisdiction, *sui generis*, and a sort of international discretion," which do not belong to Courts of Admiralty as instance courts. See also, Bork *v.* Norton, 2 McLean, 422. See also, a very instructive case on this subject, Jordan *v.* Warren Ins. Co. 1 Story, 342.

has been substituted, either expressly or tacitly, or by implication of law.[1]

If freight *pro rata* is payable, the question arises by what rule of proportion shall it be measured. One is purely geographical, and was formerly much used; that is, the whole freight would pay for so many miles, and the freight *pro rata* must pay so

[1] In the earlier cases it seems to have been supposed that the master was entitled to *pro rata* freight, if the goods were not abandoned by the owner, although the master should find it impossible to carry the goods to the port of destination, or decline to do so. In Luke *v.* Lyde, 2 Burr. 882, 885, Lord *Mansfield* said, that in the case of Lutwidge *v.* Gray, the House of Lords held, that the master was entitled to only *pro rata* freight on goods which he declined to carry to the port of destination. And Lord *Mansfield* declared that the decision was all agreeable to the maritime law. In United Ins. Co. *v.* Lenox, 1 Johns. Cas. 377, 383, *Benson*, J., after alluding to Luke *v.* Lynde, said: "From this doctrine, considered as premises, I deduce these consequences, that, although the ship cannot carry the goods, and although the master cannot find another to carry them, yet that he may, nevertheless, retain them until he is paid the freight." See also, Williams *v.* Smith, 2 Caines, 13; Robinson *v.* Mar. Ins. Co. 2 Johns. 323, where the same doctrine seems to have been supported. But the doctrine stated in the text, that an involuntary acceptance will not be sufficient to sustain a promise to pay *pro rata* freight; and hence, that the master cannot, by holding goods which he cannot carry forward, compel the owner of them to incur liability to pay freight or lose his goods, seems to be now well settled. Marine Ins. Co. *v.* United Ins. Co. 9 Johns. 186; Welch *v.* Hicks, 6 Cow. 504; Armroyd *v.* The Union Ins. Co. 3 Binn. 437; Portland Bank *v.* Stubbs, 6 Mass. 422, 427; Caze *v.* Baltimore Ins. Co. 7 Cranch, 358; The Ship Nathaniel Hooper, 3 Sumn. 542; Escopiniche *v.* Stewart, 2 Conn. 262; Parsons *v.* Hardy, 14 Wend. 215; Hurtin *v.* Union Ins. Co. 1 Wash. C. C. 530; Harris *v.* Rand, 4 N. H. 261; Griggs *v.* Austin, 3 Pick. 20; Hunt *v.* Haskell, 24 Maine, 339; Bowman *v.* Teall, 23 Wend. 306; Rossiter *v.* Chester, 1 Douglass, (Mich.) 154. In the case of The Ship Nathaniel Hooper, 3 Sumn. 542, Mr. Justice *Story* considered, very elaborately, the various questions which arise as to the freight, when a vessel is driven by perils of the sea into an intermediate port. In that case, a cargo of sugar was on its way from Havana to St. Petersburg, to stop at Boston. The vessel struck on the South Shoal, and 1,000 boxes of sugar were thrown overboard, and then she was deserted. She afterwards floated, went adrift to sea, and was taken into Boston by the crew of another vessel. Both ship and cargo were libelled for salvage. A part of the sugars were found to be in a perishable condition, and were sold under an order of court. One third of the cargo was abandoned to the underwriters and accepted by them. In twenty days after the arrival in Boston, the vessel was repaired, and offered to proceed with the cargo. But it was then in the hands of the court, and there was no one to release it, and the ship was sold before it was actually released. It was held, that in the adjustment of general average, the owners of the ship were to be allowed full freight on the goods jettisoned, and that no freight was due on those sold as in a perishing condition, on the ground that as to them the entire voyage neither was or could have been performed, but it was defeated by an overwhelming calamity. A part was sold to pay the duties and salvage; it was held that those were to be treated as if they had been lost on the voyage, and that no freight was due on them. As to the remainder, it was held, that under all the circumstances, the owners of the cargo had waived the express contract, and hence were bound to pay *pro rata* freight. No general rule can be laid down as to what acts would be sufficient to show a waiver of the contract to complete the voyage, and thus to raise a promise to pay *pro rata* freight. Mr. Justice *Story*, in his edition of Abbott on Shipping, (5 ed.) p. 549, said: "If the owner, or his agent, should refuse to pay any freight at the time of receiving them, or should receive them with a protest against freight, or with a denial of any right to claim it, or if his agents should merely act in the absence of the owner, for the benefit of all concerned, there could arise no implication of any contract to pay freight, resulting from the mere acceptance of the goods or their proceeds." The acceptance of the proceeds of goods sold by necessity in an intermediate port, is not sufficient to raise a promise to pay *pro rata* freight." Escopiniche *v.* Stewart, 2 Conn. 391.

many less. Another is purely commercial. The whole freight being a certain sum for the whole distance, what will it cost to bring the goods to the place where they are received, and how much to take them thence to their original destination. Let the original freight be divided into two parts proportional to these, and the first part is the freight *pro rata*. Neither of these, nor indeed any other fixed and precise rule is generally adopted in this country. But both courts and merchants seek by combining the two, to ascertain what proportion of the increase of value by the intended transportation, has been actually conferred upon the goods by actual partial transportation, and this is to be taken as the freight that is due *pro rata itineris*.[1]

If the bill of lading requires delivery to the consignee or his assigns, "he or they paying freight," which is usual, — and the master delivers the goods without receiving freight which the consignee fails to pay, the master or owner cannot in the absence of express contract fall back on the consignor and make him liable, unless he can show that the consignor actually owned the goods; in which case the bill of lading, in this respect, is nothing more than an order by a principal upon an agent to pay money due from the principal.[2]

[1] In Luke *v.* Lyde, 2 Burr. 882–888, the vessel had been at sea 17 days when she was captured, and was within 4 days of her port of destination. *Held*, that the owner was entitled to $\frac{17}{21}$ of the whole freight—although the freight from the place where the goods were received, Biddeford, on the coast of England, to Lisbon, was higher than for the whole original voyage from Newfoundland to Lisbon. The same rule was adopted in Robinson *v.* Marine Ins. Co. 2 Johns. 323, but *Kent*, J., said: "In the case of the Marine Ins. Co. *v.* Lenox, decided in the court for The Correction of Errors, in 1801, the rule adopted was to ascertain how much of the voyage had been performed, not when the ship first encountered the peril, and was interrupted in her course, but when the goods had arrived at the intermediate port, because that is the extent of the voyage performed, as it respects the interest of the shipper. . . The rule appears to be more just than that in Luke *v.* Lynde, but we cannot adopt it in the present case, because we have no *data* given by which we might ascertain the difference of the voyage, as it respected the port of destination, between Kingston (where the goods were received,) and the place where the vessel was forced out of her course." In Coffin *v.* Storer, 5 Mass. 252, the vessel was chartered by the month, the ship-owner was allowed what would have been due for the entire voyage, at the average time, deducting the expense of transporting the goods from the place where they were wrecked to the port of destination. The court remarked that the rule in Luke *v.* Lynde, was manifestly unjust.

[2] In Barker *v.* Havens, 17 Johns. 234, *Spencer*, C. J., said: "The effect of this clause has been repeatedly considered in the English courts and the decisions have been uniform in both the King's Bench and Common Pleas. In Shepherd *v.* De Bernals, (13 East, 565,) Lord *Ellenborough* examined all the cases, and he considered the clause introduced for the benefit of the carrier of the goods only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad, before he should make delivery of the goods; and that he had a right to waive the benefit of that provision in his favor, and to deliver, without first receiving payment, and was not

Generally, the one who receives the goods under the common bill of lading is liable for the freight;[1] but not if he be merely an indorsee or assignee of the consignee, and obtain them by his order, and not under the bill of lading, unless such indorsee, by express or implied promise, agrees to pay the freight.[2] If the master delivers goods to any one, saying that he should look to him for the freight, he may demand the freight of him unless that person had the absolute right to the goods without payment of freight; which must be very seldom the case.[3]

If freight be paid in advance, and not subsequently earned, it must be repaid, unless it can be shown that the owner took a less sum than he would otherwise have had, and for this or some

precluded, by such delivery, from afterwards maintaining an action against the consignor. He observes, that the cases he cited, proved that such a clause did not, in general, cast the duty on the captain, at his peril, of obtaining freight from the consignee; but that if he could not get it from him, he may insist on having it from the consignor. He admits that the rule might be otherwise in a case differently circumstanced; and he lays stress on the fact, that the delivery was to be to the correspondents, factors, and agents of the defendant. I should clearly be of opinion, that if it appeared that the goods were not owned by the consignor, and were not shipped on his account, and for his benefit, that the carrier would not be entitled to call on the consignor for freight; and I should incline to the opinion that, in all cases, the captain ought to endeavor to get the freight of the consignee." See also, Domett *v.* Beckford, 5 B. & Ad. 521; Tapley *v.* Martens, 8 Term, 451; Christy *v.* Row, 1 Taunt. 300; Marsh *v.* Predder, 4 Camp. 257; Collins *v.* Union Transp. Co. 10 Watts, 384; Spencer *v.* White, 1 Ired. 236; Hayward *v.* Middleton, 3 McCord, 121; Layng *v.* Stewart, 1 Watts & Serg. 222; Grant *v.* Wood, 1 N. Jer. 292. But if the consignor, although not the owner of the goods, has expressly agreed by charter-party to pay the freight, it would seem from the principles laid down in Shepard *v.* De Bernales, and in Domett *v.* Beckford, that he would be liable for it, if the master had delivered the goods, without receiving the freight. In the latter case, *Parker*, J., said the clause gave the master "the option of insisting on receiving the freight before he should make delivery of the goods."

[1] Under the usual bill of lading, the goods are to be delivered to the consignee or his assigns, on the payment of freight. If goods are accepted under this bill of lading, the party receiving them, whether the consignee, or his assignee, becomes liable for the freight. Cock *v.* Taylor, 13 East, 399; Dougal *v.* Kemble, 3 Bing. 383; Roberts *v.* Holt, 2 Show. 443; Moorsom *v.* Kymer, 2 M. & S. 303; Merian *v.* Funck, 4 Denio, 110; Trask *v.* Duvall, 4 Wash. C. C. 184. In Sanders *v.* Vanzeller, 4 Q. B. 260, it was held, in the Exchequer Chamber, that the law would not imply a contract to pay freight, from the acceptance of goods, under a bill of lading with the usual clause, but that a jury might infer from such acceptance, a promise to pay it. If the bill of lading does not make the delivery conditional upon the payment of freight, then the consignor, unless he is the owner, does not incur any liability for the freight; but a contract may be inferred from usage. Coleman *v.* Lambert, 5 M. & W. 502; Wilson *v.* Kymer, 1 M. & Sel. 157. The indorsement of the bill of lading by the consignee, does not make him liable for freight. Merian *v.* Funck, 4 Denio, 110; Tobin *v.* Crawford, 5 M. & W. 235. If goods are received by one as agent of the consignor he does not thereby become personally liable to pay the freight. Amos *v.* Temperley, 8 M. & W. 798; Ward *v.* Felton, 1 East, 507. As to liability of consignee to pay demurrage, see Smith *v.* Sieveking, 30 E. L. &. E. 382.

[2] Wilson *v.* Kymer, 1 M. & S. 157. See preceding note.

[3] Scaife *v.* Tobin, 3 Barn. & Adol. 523.

other equivalent reason the money paid was in final settlement and was to be retained by the owner at all events.[1]

If a consignee pay more than he should, he may recover it back, if paid through ignorance or mistake of fact; but not if with full knowledge of all the facts, he was ignorant or mistaken as to the law.

If one sells his ship after a voyage is commenced, he only can claim the freight of the shipper, although the contract of sale may require him to pay it over to the purchaser.[2] A mortgagee of a ship who has not taken possession, has not, in general, any right to the freight, unless this is specially agreed. Neither has a lender on a bottomry bond.[3] But it seems that a mortgagee is entitled to the freight accruing after he takes possession, although the outfits for the voyage were furnished by the mortgagor.[4]

No freight, of course, can be earned by an illegal voyage; as the law will not enforce any illegal contract, or sanction any illegal conduct.[5]

The goods are to be delivered, by the bill of lading, in good condition, excepting "the dangers of the seas," and such other risks or perils as may be expressed. If the goods are damaged, to any extent, by any of these perils, and yet can be, and are delivered in specie, the freight is payable.

The shipper or consignee cannot abandon the goods for the freight, although they may be worthless; for damage caused by an excepted risk is his loss, and not the loss of the owner.[6] But

[1] Griggs *v.* Austin, 3 Pick. 20; Watson *v.* Duykinck, 3 Johns. 335; Phelps *v.* Williamson, 5 Sandf. 578; Pitman *v.* Hooper, 3 Sumner, 50, 66; Gillan *v.* Simpkin, 4 Camp. 241. In Watson *v.* Duykinck, *Kent*, C. J., after a careful examination of the question, said: "The general principle undoubtedly is, that freight is a compensation for the carriage of goods, and if paid in advance, and the goods be not carried, by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid upon a consideration which happens to fail." But the agreement in that case was to suffer the plaintiff to proceed and go in the defendant's vessel, as a passenger, from New York to St. Thomas, and to load on board, for transportation, goods to the value of $600, and it was held to be rather an agreement "for the loading of the article on board," than for freight in the strict sense of the word, and that the money paid in advance could not be recovered back although the vessel was lost.

[2] Pelayo *v.* Fox, 9 Barr, 489.

[3] See *ante*, p. 339, notes 1 and 2.

[4] Kerswill *v.* Bishop, 2 Cr. & J. 529.

[5] Muller *v.* Gernon, 3 Taunt. 394.

[6] Griswold *v.* N. Y. Ins. Co. 3 Johns. 321; S. C. 1 Johns. 205; M'Gaw *v.* Ocean Ins. Co. 23 Pick. 205, 210; Whitney *v.* N. Y. Firemen Ins. Co. 18 Johns. 208. In Griswold *v.* N. Y. Ins. Co., *Kent*, C. J., said: "The contract of affreightment, like other contracts of letting to hire, binds the shipper personally, and the lien which the ship-owner has on the goods conveyed, is only an additional security for the freight. The lien is not incompatible with the personal responsibility of the shipper, and does not extinguish it. The consideration of the freight is the carriage of the article

if they are lost, in substance, though not in form; as if sugar is washed out of boxes or hogsheads, or wine leaks out of casks, by reason of injury sustained from a peril of the sea, though the master may deliver the hogsheads or boxes or casks, this is not a delivery of the sugar or of the wine, and no freight is due.[1] If the goods are injured, or if they actually perish and disappear, from internal defect or decay or change, that is, from causes inherent in the goods themselves, freight is due.[2] If they are lost from the

shipped on board, and the state or condition of the article, at the end of the voyage, has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his hire to the goods conveyed. It cannot be deduced from the nature of the undertaking. The ship-owner performs his engagement when he carries and delivers the goods. The condition which was to precede payment, is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract, or compare it with the common law doctrine of carrying for hire, we cannot discover any principle which makes the carrier an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of their value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper."

[1] In Frith *v.* Barker, 2 Johns. 327, one hundred and ninety hogsheads of sugar were shipped from Surinam to New York. Owing to the perils of the sea, the ship leaked, and fifty hogsheads of the sugar were washed out so that the casks were empty on arrival. The owner of the cargo refused to pay freight on the empty hogsheads. It was held, that he was not liable. *Kent*, C. J., said: "The sugar was, in this case, as effectually destroyed, as if it had been at once swept into the sea and had gone to the bottom. Bringing into port the empty hogsheads, was not bringing the hogsheads of sugar which the defendant had undertaken to do. A hogshead of merchandise is considered by Pothier, (Charte-Partie, No. 60,) as having perished, if the cask arrives empty, because the goods no longer exist; and, consequently, the master cannot be said to have carried them to their place of destination. And however the authorities may differ, on the assumed right to abandon damaged goods in discharge of freight, yet they all agree that you may abandon casks, leaked out by the perils of the sea, as the subject-matter of the contract no longer exists. (Le Guidon, c. 7, § 11; Ord. du Fret. Art. 26, valin, 672, and Pothier's Charte-Partie, 60.) I wish to be understood, as confining this opinion strictly to the facts in the case, which establish that the sugar was entirely gone, by the perils of the sea, before the arrival of the vessel in port. It will not, therefore, apply to the case of an article that is lost by other causes than the perils of the sea, such as internal decay, leakage, evaporation, and the like."

[2] See preceding note. In Clark *v.* Barnwell, 12 How. 272, a libel was brought against a vessel by the owners of twenty-four boxes of cotton thread for damage done to it on board the vessel on a voyage from Liverpool to Charleston. *Nelson*, J., in delivering the opinion of the court, said: "Now the evidence shows very satisfactorily that the damage to the goods was occasioned by the effect of the humidity and dampness, which in the absence of any defect in the ship, or navigation of the same, or in the storage, is one of the dangers and accidents of the seas, for which the carrier is not liable. The burden lay upon the libellants to show that it might, notwithstanding, have been prevented by reasonable skill and dilligence of those employed in the conveyance of the goods. For, it has been held, if the damage has proceeded from an intrinsic principle of decay, naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. 12 East, 381; 4 Camp. 119; 6 Taunt. 65; Abbott on Ship. 428, (Shee's ed.) But if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they may still be held liable." See also Rich *v.* Lambert, 12 How. 347.

fault of the owner, the master, or crew, the owner must make the loss good, but in this case may have by way of offset or deduction, his freight, because the shipper is entitled to full indemnification, but not to make a profit out of this loss.[1] If goods are delivered, although damaged and deteriorated from faults for which the owner is responsible, as bad storage, deviation, negligent navigation or the like, freight is due; the amount of the damage being first deducted.[2]

The rules in respect to passage-money are quite analogous to those which regulate the payment of freight.[3] Usually, however, the passage-money is paid in advance. But it is not earned except by carrying the passenger, or, *pro rata*, by carrying him a part of the way with his consent. And if paid in advance and not earned by the fault of the ship or owner, it can be recovered back.[4]

[1] Watkinson *v.* Laughton, 8 Johns. 213; Amory *v.* M'Gregor, 15 Johns. 24. In Watkinson *v.* Laughton, the goods were embezzled, but without fraud on the part of the master, against whom the action was brought. *Held*, that the measure of damages was the net value of the goods at the port of delivery, deducting freight and other charges.

[2] Davidson *v.* Gwynne, 12 East, 381; Sheels *v.* Davies, 4 Camp. 119; Edwards *v.* Todd, 1 Scam. 462; Leech *v.* Baldwin, 5 Watts, 446; Glover *v.* Dufour, 6 Louis. Ann. 490; The Ninetta, Crabbe, 534. In Davidson *v.* Gwynne, the action was for freight under a charter-party, which entitled the ship-owner to freight "on a right and true delivery of the whole of the goods, agreeably to bills of lading." The bills of lading required them to be delivered in good order and well conditioned. The cargo, consisting of chests of fruit, was much injured by the negligence of the master and crew in not ventilating sufficiently. The freight was recovered. Lord *Ellenborough* ruled: "That the allegation of having made a right and true delivery of the cargo, was satisfied by the delivery made of the number of chests of fruit shipped on board; and that if the contents of any of them turned out to be damaged by the negligent stowing, or subsequent want of care and proper ventilation by the master and crew, the defendant had a cross-action to recover damages; but that it was no answer to an action for the freight. . . . That the issue on the fact of a right and true delivery of the goods according to the bills of lading, was to be taken in a narrow and restricted sense, such as in his own experience, it had always received, as meaning a right and true delivery of the entire number of chests or packages shipped on board, as specified in the bills of lading." In England, in an action at law for the goods, the amount of damage from bad stowing, or the like, cannot be set off. Sheels *v.* Davies, 4 Camp. 119. In Pennsylvania, such a set-off was allowed; Leech *v.* Baldwin, *supra;* and in Illinois, under a statute, Edwards *v.* Todd, *supra.* See also, Glover *v.* Dufour, 6 Louis. Ann. 490; Humphreys *v.* Reed, 6 Whart. 435; Dickinson *v.* Haslet, 3 Har. & John. 345. How far this circuity of action will be sustained in this country, is not settled. See notes to Cutter *v.* Powell, 2 Smith, Lead. Cas. 1.

[3] Watson *v.* Duykinck, 3 Johns. 335; Mulloy *v.* Backer, 5 East, 316; Howland *v.* Lavinia, 1 Pet. Ad. 126; Griggs *v.* Austin, 3 Pick. 20. The ship-owner has a lien on the baggage of a passenger for the passage-money. In Wolf *v.* Summers, 2 Camp. 631, an action of trover was brought for a trunk filled with wearing apparel and a writing-desk. The defendant retained them for the non-payment of passage money. *Lawrence*, J., said: "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing, when he is about to leave the vessel; but I think the lien does extend to any other property he may have on board."

[4] See *ante*, p. 354, n. 1, and Moffat *v.* East India Co. 10 East, 468.

SECTION VII.

OF CHARTER-PARTIES.

The owner may let his ship to others; and the written instrument by which this is done, is called by an ancient name, the origin of which is not quite certain, a Charter-Party. The form of this instrument varies considerably, because it must express the bargain between the parties, and this of course varies with circumstances and the pleasure of the parties.[1] An agreement to make and receive a charter, though not itself equivalent to a charter, will, if the purposes of the proposed charter are carried into effect, be considered as evidence that such a charter was made and was consummated.[2]

Generally, only the burden of the ship is let; the owner holding possession of her, finding and paying her master and crew, and supplies and repairs, and navigating her as is agreed upon. Sometimes, however, the owner lets his ship as he might let a house; and the hirer takes possession, mans, navigates, supplies, and even repairs her.

In the latter case, bills of lading are not commonly given to the hirer, unless the hirer takes the goods of other shippers, but in that case bills of lading are given by him to them; but in the former, which we have said is much more common, bills of lading are usually given as in the case of a general ship, for much the same purpose and with much the same effect.

There is no particular form for a charter-party, but in all our commercial cities blank forms are sold by mercantile stationers. They should designate particularly the ship, and master, and the parties; should describe the ship generally, and particularly as to her tonnage or capacity;[3] should designate especially what parts

[1] Taggard *v.* Loring, 16 Mass. 336; Thompson *v.* Hamilton, 12 Pick. 428; Muggridge *v.* Eveleth, 9 Metc. 233; The Phebe, Ware, 263; 3 Kent's Comm. 203–204; 4 Hare, 456.

[2] The Schooner Tribune, 3 Sumner, 144.

[3] Molloy, Lib. 2, c. 4, § 8; Abbott on Ship. p. iv. c. 1, § 2; Thomas *v.* Clarke, 2 Stark, 450, but where a merchant covenanted to load a full and complete cargo on board a ship described in the charter-party as of the burden of 261 tons or thereabouts; the burden thus expressed was considered by the court in the absence of fraud, not to be conclusive on the parties, and the freighter was held answerable on the covenant for not furnishing a full cargo. Although it was found that 400 tons of goods of the kind actually loaded, were requisite to constitute such a cargo. Hunter *v.* Fry, 2 B. & Ald. 421. See also, Duffie *v.* Hayes, 15 Johns. 327; Ashburner *v.* Balchen, 3 Seld. (N. Y.)

of the ship are let, and what parts, if any, are reserved to the owner, or to the master, to carry goods, or for the purpose of navigation; should describe the voyage, or the period of time for which the ship is hired, with proper particularity; should set forth the lay days, demurrage, the obligation upon either party to man, navigate, supply, and repair the ship, and all other particulars of the bargain, for this is a written instrument of an important character, and cannot be *varied* by any external evidence.[1] Finally it should state, distinctly and precisely, how much is to be paid for the ship — whether by ton, and if so, whether by ton of measurement or ton of capacity of carriage, or in one gross sum for the whole burden, — and when the money is payable, and how, that is in what currency or at what exchange, especially if it be payable abroad. The charter-party usually binds the ship and freight to the performance of the duties of the owner, and the cargo to the duties of the shipper. But the law-merchant would, generally at least, create this mutuality of obligation if it were not expressed.[2]

If the hirer takes the whole vessel, he may put the goods of other shippers on board, (unless prevented by express stipulation),[3] but whether he fills the whole ship or not, he pays for the whole;[4] and what he pays for so much of the ship as is empty, is said to be paid for dead freight.[5] This is calculated on the actual capacity of the ship, unless she is agreed to be of a specified tonnage.[6] If either party is deceived or defrauded by any

262. As to the case of fraud in the misrepresentations, see Johnson *v.* Miln, 14 Wend. 195.

[1] As to the general principles respecting the admission of parol evidence to affect written contracts, see 2 Parsons on Cont. 59–79.

[2] See *ante*, p. 345, n. 1.

[3] Hunter *v.* Fry, 2 Barn. & Ald. 421; Michenson *v.* Begbie, 6 Bing. 190; Abbott on Ship. 246; 3 Kent's Comm. 202.

[4] Thompson *v.* Inglis, 3 Camp. 428; Heckscher *v.* McCrea, 24 Wend. 304. In this last case it was held to be the duty of the master, where the charterer failed to furnish a full cargo, according to the agreement, and goods were offered by third parties to make up the deficiency at current, although reduced rates, to take them and credit the charterer with the amount thus earned.

[5] 3 Kent's Comm. 219. Chancellor *Kent* considers it to be the doctrine of Bell *v.* Puller, 2 Taunt. 286, that the equity of this claim for dead freight would extend to the case of the master's bringing back the outward cargo where it could not be disposed of, although the charter-party contained no provision as to a return cargo.

[6] *Supra*, p. 257, n. 3. But if the agreement be only to pay so much per ton for all goods laden on board, and the charter-party contains no stipulation on the part of the shipper to furnish a full cargo, payment can only be claimed by the ship-owner for the amount actually shipped. 3 Kent's Comm. 219. Where payment was to be made "per cask or bale," the shipper was held to pay for the goods brought, although the master refused to remain long enough to take in a full cargo, which he had agreed to take. Ritchie *v.* Atkinson, 10 East, 295. In such case, he is not liable to pay dead freight,

statement in the charter-party, he has, of course, his remedy against the other party.[1]

The question has arisen under charter-parties, analogous to that under bills of lading, whether the lien of the ship-owner on the cargo, for freight, is lost by want of possession. Here, however, the owner seems to let his ship out of his hands, and not to be the carrier of the charterer. Hence, in England, there have been great doubts whether the technical defect of possession did not destroy this lien. Less weight is now given to this agreement, than formerly, even there. In this country it seems to be settled that the owner, under any common charter-party, and especially if bills of lading are signed by his master, has this lien on the cargo for his freight. If however he lets his whole ship, giving up the possession entirely, and having nothing to do with the officers or men or navigation, and of course not being a party through his master to the bills of lading, it would seem that there can be no sufficient ground for a lien. His contract with the hirer is purely personal, and to him alone he looks for the payment of the money due.[2]

and the ship-owner may be liable to him in damages for the act of the captain. Dunbar *v.* Buck, 6 Munfd. 34.

[1] In an action upon a charter-party to recover the price agreed upon for the use of the vessel, the defendant may give evidence of fraudulent representations by the plaintiff as to the burden of the vessel, in mitigation or satisfaction of the plaintiff's claim. Johnson *v.* Miln, 14 Wend. 195.

[2] The question of the ship-owner's lien on the goods carried for his freight, irrespective of the charter-party, has been already discussed. See *ante*, p. 345, and notes. The existence of this instrument renders it necessary to decide the preliminary question of possession under it. For the party having possession of the vessel we have already seen is usually the one entitled to the benefit of the lien. *Primâ facie* this is the general owner, and it will be so accounted in doubtful cases. *Story*, J., in the case of Certain Logs of Mahogany, 2 Sumn. 589. But there is no doubt that he may make such an agreement with the charterer that the possession of the ship, and with it the lien, will thereby pass to the latter. "The defendant, the owner of the ship," said Chief Justice *Dallas*, in Christie *v.* Lewis, 2 Brod. & Bing. 410, contends that he had a lien on the goods on board, for the freight due or the money received for such freight. To have a lien, he must have had at the time of the asserted exercise of it, the possession of the ship. He had the possession when he executed the charter-party, — and the question is whether by the charter-party, he has parted with the possession for the particular voyage. In the absence of express provisions on this point in the charter-party this question of possession depends upon another, namely, who is the owner *pro tempore* under the instrument; for upon such special ownership the constructive possession attends. "The owner of a ship, so long as he continues in possession of the ship, is in possession also of the goods carried by her, and his right to a lien on them for the freight due in respect of them whether by charter-party, or under a bill of lading, has never been questioned. He may, if he think proper, part with that possession, he may demise her for a term, surrender all control over the ship itself, the appointment of her master and mariners, and even relieve himself from responsibility for wages and repairs. If he do so, the person to whom he lets the ship, who is called the charterer, becomes owner *pro tempore*, the rights of the absolute owner are suspended, and among them his right of lien for the freight of goods carried by his ship." Abbott on Ship.

If a charterer takes the goods of other shippers, payment by one of them to the master or owner, is a good defence against the claim of the charterer against him, for so much as the charterer was bound to pay the owner, but no more.[1]

p. 288, 289. Whether the contract is to be considered as a hiring of the vessel itself, or merely of its tonnage or carrying capacity a *locatio rei*, or *locatio operis vehendarum mercium* as writers on commercial law sometimes style it, is one of construction on the contract. Clarkson *v.* Edes, 4 Cowen, 470. In determining this point, the court pay more attention to the intent of the parties as manifested by the substantial provisions of the agreement than to special clauses and the employment of technical terms. See Palmer *v.* Gracie, 4 Wash. C. C. 110, and 8 Wheat. 605; The Schooner Volunteer, 1 Sumn. 568. Certain Logs of Mahogany, *supra*. In the first of these cases it was held by the court upon a view of the whole contract, that the special ownership did not pass to the charterer although the words employed were "let and hired" and the freight was a gross sum to be paid before the discharge of the cargo. So in the case of The Schooner Volunteer, *supra*, the court came to a similar decision, although the general owner declared in the charter-party that he had "letten to freight" the whole vessel. This of course does not extend in cases arising on the question of lien to the introduction into the charter-party of any express provision upon the subject of possession of the goods for the purpose of carriage and earning the freight thereby, which must from the nature of the case be decisive as to the claim of lien. The party having the possession and control of the ship under the charter-party, is the one entitled to the lien, and will be considered the owner *pro tem.* for this purpose. See besides the cases before cited. Ruggles *v.* Bucknor, 1 Paine, C. C. 358; The Brig Spartan, Ware, 149; The Phebe, Ware, 265; Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 49; Lander *v.* Clark, 1 Hall, 375; Pickman *v.* Woods, 6 Pick. 248; Brown *v.* Howard, 1 Cal. 423; Hutton *v.* Bragg, 7 Taunt. 640; Faith *v.* E. I. Co. 4 B. & Ald. 640. This question of ownership *pro tem* under the charter-party is one of very frequent occurrence, arising as it does, wherever the claim sought to be enforced against one of the parties to such agreement depends on the existence of such special ownership in the defendant. It has accordingly been elaborately discussed by the courts of England and America in a variety of cases both of tort and contract. See Rich *v.* Coe, Cowp. 636; Fletcher *v.* Braddick, 5 Bos. & Pul. 182; Parish *v.* Crawford, Abbott on Ship. 42; Frazer *v.* Marsh, 13 East, 238; Saville *v.* Campion, 2 B. & Ald. 503; Laugher *v.* Pointer, 5 B. & Cres. 578; Lucas *v.* Nockells, 4 Bing. 729; Colvin *v.* Newberry, 6 Bligh. 189; Newberry *v.* Colvin, 7 Bing. 190; Reeve *v.* Davis, 1 Adol. & Ellis, 312; Trinity House *v.* Clarke, 4 M. & Sel. 288; Dean *v.* Hogg, 6 Car. & Payne, 54; Belcher *v.* Capper, 4 Man. & Gra. 502; Martin *v.* Temperly, 7 Jurist. 150; Hooe *v.* Groverman, 1 Cranch, 214; Ship Nathaniel Hooper, 3 Sumn. 575; Arthur *v.* Schooner Cassius, 2 Story, 92; Skolefield *v.* Potter, Davois, 392; M'Intyre *v.* Bowne, 1 Johns. 229; Hallet *v.* Col. Ins. Co. 8 Johns. 272; Holmes *v.* Pavenstedt, 5 Sandfd. 97; Reynolds *v.* Toppan, 15 Mass. 370; Taggard *v.* Loring, 16 Mass. 336; Perry *v.* Osborne, 5 Pick. 422; Cutler *v.* Windsor, 6 Pick. 335; Thompson *v.* Hamilton, 12 Pick. 425; Manter *v.* Holmes, 10 Metc. 402; Thompson *v.* Snow, 4 Greenlf. 264; Emery *v.* Hersey, id. 407; Winsor *v.* Cutts, 7 id. 261; Houston *v.* Darling, 16 Maine, 413; Cutler *v.* Thurlo, 20 id. 213; Williams *v.* Williams, 23 id. 17; Sproat *v.* Donnell, 26 id. 185; Swanton *v.* Reed, 35 id. 176; Webb *v.* Peirce, 5 Law Rep. U. S. 9; Pitkin *v.* Brainerd, 5 Conn. 451. In the greater part of the above cases the courts appear to have recognized the existence of the principles before stated, although in their application of them to particular circumstances there exists considerable discrepency. It was indeed doubted by Lord Mansfield in the early case of Rich *v.* Coe, whether any agreement between the general owner of the ship and the charterer could be allowed to vary their respective liability towards third parties having no notice of such agreement. See also, Fletcher *v.* Braddick, *supra*. And in the modern American case of Skolefield *v.* Potter, *supra*. Justice Ware seemed inclined to favor the doctrine of Lord Mansfield although admitting that it appeared to be overruled to a certain extent by subsequent decisions. But see the language of Justice Curtis in Webb *v.* Pierce, 15 Law Rep. and that of Abbott before cited.

[1] Paul *v.* Birch, 2 Atk. 621; Mitchell *v.* Scaife, 4 Campb. 298; Christie *v.* Lewis, 2 Brod. & Bing. 410; Faith *v.* East India Co. 4 B. & Ald. 630; Small *v.* Moates, 9 Bing. 574; Holmes *v.* Pavenstedt, 5 Sandf. 97. In the first of these cases, the char-

The voyage may be a double one; a voyage out, and then a voyage home; or a voyage to one port, and thence to another. The question sometimes arises, whether any freight is payable if the ship arrives in safety out, and delivers her cargo there, and is lost on her return with the cargo that represents the cargo out. Of course, the parties may make what bargain they please, and the law respects it; but in the absence of an agreement on this point, the tendency of the courts, to say the least, is to consider each voyage, at the termination of which goods are delivered, as a voyage by itself, earning its own freight.[1]

terers appear to have hired the ship itself at a monthly freight, but by a clause in the charter-party, a lien on the goods which they might carry, was expressly reserved to the general owner. The charterers having become bankrupt, the owner sued the shippers of goods for the whole amount due to him upon the charter-party. But Lord Hardwicke, admitting that, by the general law, the cargo was liable to pay the freight, and that, to the extent of their own contract with the charterers, the defendants were liable, decided that they were not so for the amount due upon the original agreement, to which they were not parties. Mitchell *v.* Scaife, *supra*, differed from Paul *v.* Birch in the facts, that there appears not to have been any hiring of the ship itself, the general owner remaining the owner *pro tempore*, and no express lien was therefore necessary, or, as it seems, reserved in the charter-party. The captain signed bills of lading for the cargo, the property of third parties, at a lower rate than that specified in the charter-party; but on the arrival of the vessel in port, the ship-owner refused to deliver the goods till the full amount due to him was paid, and trover was accordingly brought to recover them. Lord *Ellenborough* said: "Upon the facts proved, I am of opinion that the ship-owner had no right to detain the cargo for more than the freight mentioned in the bill of lading. The plaintiff is the *bonâ fide* indorsee of the bill of lading, and, having paid the bills of exchange, must be taken to be the purchaser and owner of the cargo. He is in no degree connected with any fraud upon the charter-party. He knew that this is an instrument which the master has, in general, authority to sign, and he seems to have had no reason to suspect that this authority was not properly exercised upon this occasion. Under such circumstances, I am of opinion that the owner of the ship cannot be heard to aver against the contract created by his own agent." The doctrine of Paul *v.* Birch was further ratified in Christie *v.* Lewis, and Faith *v.* East India Co. In the former, Chief Justice *Richardson* said: "It is true that, according to the decision in Paul *v.* Birch, the owner has not a lien on the goods mentioned in the bills of lading, for all his freight due on the charter-party, but he is entitled to the freight on the bills of lading, in preference to the freighter." But, *semble*, "that, if the lading of the ship belong to the charterer, and such lading is subject to the ship-owner's lien for the freight reserved by the charter-party, such lading, if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the ship-owner had before the sale." Per *Tindall*, C. J., in Small *v.* Moates, *supra*.

[1] Abbott on Shipping, 463; Mackrell *v.* Simond, id. 464; Byrne *v.* Pattinson, id. 466; Smith *v.* Wilson, id. 469, 8 East, 437; Storer *v.* Gordon, 3 M. & S. 308; Gibbon *v.* Mendez, 2 B. & Ald. 17; Crozier *v.* Smith, 1 Scott, N. R. 338; The Friends, 1 Edw. Ad. 246; Barker *v.* Cheriot, 2 Johns. 352; Scott *v.* Libby, 2 Johns. 336; Pennoyer *v.* Hallet, 15 Johns. 332; Burrill *v.* Cleeman, 17 Johns. 72; Coffin *v.* Storer, 5 Mass. 252; Brown *v.* Hunt, 11 id. 45; Locke *v.* Swan, 13 id. 76; Towle *v.* Kettell, 5 Cush. 18; Blanchard *v.* Bucknam, 3 Greenl. 1; Hamilton *v.* Warfield, 2 Gill & Johns. 482. In Brown *v.* Hunt, *supra*, Chief Justice *Sewall* said: "It is not disputed that, where an outward voyage and a homeward voyage are spoken of in a contract as distinct, there the freight becomes due upon the performance of each voyage. It would, however, be unreasonable to suppose this construction to be restricted to the particular expressions and case of an outward and homeward voyage. Any other expressions descriptive of a voyage or adventure consisting of several distinct and separate passages or voyages, are within the same reason, and seem to be governed by the same rule."

As time has become of the utmost importance in commercial transactions, both parties to this contract should be punctual, and cause no unnecessary delay; and for such delay the party injured would have his remedy against the party in fault.[1] The charter-party usually provides for so many "lay-days," and for so much "demurrage." Lay-days, or working days, are so many days which the charterer is allowed for loading, or for unloading the vessel. These lay-days are counted from the arrival of the ship at her dock, wharf, or other place of discharge, and not from her arrival at her port of destination, unless otherwise agreed on by the parties.[2] In the absence of any custom or bargain to the contrary, Sundays are computed in the calculation of lay-days at the port of discharge; but if the contract specifies "working lay-days," Sundays and holidays are excluded.[3] If more time than the agreed lay-days is occupied, it must be paid for; and "demurrage" means what is thus paid. Usually, the charterer agrees to pay so much demurrage a day. If he agrees only to pay demurrage, without specifying the sum, or if so many working days are agreed on, and nothing more is said,[4] it would, generally at

[1] "There can be no doubt, I think, that, when there has been no express agreement for demurrage, if the vessel is detained an unreasonable time by the freighter or consignee, the owner of the vessel may recover damages in the nature of demurrage for such detention. To sustain such action, it must appear that the vessel was improperly detained." Per *Harris*, J., in Clendaniel *v.* Tuckerman, 17 Barb. 184. See also Kell *v.* Anderson, 10 Mees. & Wels. 498; Horn *v.* Bensusan, 9 Car. & Payne. 709.

[2] Brown *v.* Johnson, 10 Mees. & Wels. 331; Kell *v.* Anderson, id. 498; Brereton *v.* Chapman, 7 Bing. 559; Gibbens *v.* Buisson, 1 Bing. N. C. 283, 1 Scott, 133; Balley *v.* De Arroyave, 7 Adol. & Ell. 919.

[3] Brooks *v.* Minturn, 1 Cal. 481. In England, it has simply been held that the lay-days may be "running days," where such appears on the charter-party to have been the intention of the parties. Brown *v.* Johnson, *supra*. It is not necessary, before they can begin to run, that the consignees should be notified of the arrival of the vessel. Harman *v.* Clarke, 4 Campb. 159; The Same *v.* Mant, id. 161.

[4] "Demurrage," so called, can be recovered, properly speaking, only where it is reserved by the charter-party or bill of lading. The remedy, where no such express reservation exists, appears to be by an action on the case for damages, in the nature of demurrage, for the detention. See Kell *v.* Anderson, 10 Mees. & Wels. 498, where *Abinger*, C. B., said: "I thought that, as no time was limited by the charter-party, from which the demurrage was to be reckoned, it must be reckoned from the time of the ship's arrival at the ordinary place of discharge, and that, if she was prevented from discharging sooner by the fault of the defendant, that should have been the subject of an action on the case, and not of an action for demurrage." So, *Harris*, J., in the recent American case of Clendaniel *v.* Tuckerman, 17 Barb. 184: "It is true that demurrage, properly so called, is only payable when it is stipulated for in the contract of affreightment; but it is also true, that, when a vessel has been improperly detained by the freighter or consignee of the cargo, the owner may have a special action for the damage resulting to him from the detention." See also, on this point, Brouncker *v.* Scott, 4 Taunt. 1; Horn *v.* Bensusan, 9 Car. & Payne, 709; Atty *v.* Parish, 4 Bos. & Pul. 104; Robertson *v.* Bethune, 3 Johns. 342; Evans *v.* Forster, 1 Barn. & Adol. 118. In Brouniker *v.* Scott, *supra*, the master of a ship brought an action to recover a com-

least, be considered that the number of lay-days determined what was a reasonable and proper delay, and that for whatsoever was more than this, the party in fault must pay a reasonable indemnity.[1] If, after the lay-days allowed for unlading, have commenced, and, of course, after a safe arrival, but before the cargo is unladen, ship and cargo, or cargo alone, is lost, without the fault of the ship, of the owner, or of the master, the freight or charter-money is due, because that was earned by the safe arrival.[2]

If time be occupied in the repairs of the ship, which are made necessary, without the fault of the owner or master, or of the ship itself, that is, if they do not arise from her original unseaworthiness, the charterer pays during this time.[3]

Many cases have arisen where the ship was delayed by different causes, and the question occurred, which party should pay for the time thus lost. On the whole, we should say that no delay arising from the elements, as from ice, or tide, or tempest, or from any act of government, or from any real disability of the consignee, which could not be imputed to his own act, or to

pensation in damages for the detention of his ship beyond a reasonable time for the delivery of her cargo in the port of London, and declared also generally for demurrage. It was held that such an action could not be maintained by the master, whatever right the owners might have to sue in their own names. See also Evans *v.* Forster, *supra*. But where the master is owner *pro tempore*, he may bring the action. Thus, where he sailed the vessel under a contract with the owner, by which he was to find the crew and provisions, pay half the labor, port charges, &c., and receive half the net freight earned by the vessel, it was held that he thereby acquired a special property in the ship sufficient to enable him to maintain an action for damages in the nature of demurrage. Clendaniel *v.* Tuckerman, *supra*.

[1] Rogers *v.* Forresters, 2 Campb. 483; Burmester *v.* Hodgson, id. 488. Even where the rate of demurrage is fixed by the agreement, it has been held not conclusive on either party. See Moorsom *v.* Bell, 2 Campb. 616, where Lord *Ellenborough* said: "If a ship is detained beyond her days of demurrage, *primâ facie*, the sum allowed as demurrage shall be taken as the measure of compensation. But it is open to the shipowner to show that more damage has been sustained, and to the freighter to show there has been less than would thus be compensated. We think, however, that it would require strong evidence to overcome the specific agreement of the parties, even if such evidence were admitted."

[2] Brown *v.* Ralston, 9 Leigh, 532; Clendaniel *v.* Tuckerman, 17 Barb. 184. In this last case, whilst waiting to unload her cargo, the vessel was capsized by a freshet, and the greater part of her cargo lost. But freight was claimed and allowed for the whole, on the ground stated in the text.

[3] See Kimball *v.* Tucker, 10 Mass. 192. "The hirer must not abandon the vessel while he can keep her afloat, and suitably provided for the employment and destination for which she was hired; and the owner must be ready to pay all expenses and damages necessarily incurred for the purpose." But the freight will not be bound by the charter-party, unless the vessel can be repaired within a reasonable time. Purvis *v.* Tunno, 1 Brev. 260.

his own wrongful neglect, would give rise to a claim on the charterer for demurrage.[1]

Demurrage seems essentially due only for the fault or voluntary act of the charterer;[2] but if he hires at so much on time, that is, by the day, week, or month, then, if the vessel be delayed

[1] Rogers *v.* Hunter, 1 Mood. & Mal. 63; Dobson *v.* Droop, id. 441; Douglas *v.* Moody, 9 Mass. 555. In England, however, it was held, in the earlier cases, that, where the charter-party contains a stipulation to pay demurrage, and the ship is detained beyond the lay-days allowed by the agreement, the merchant must pay the demurrage, although the delay was owing to circumstances entirely beyond his control. As, where the detention was owing to the crowded state of the London docks. Randall *v.* Lynch, 2 Campb. 356, 12 East, 179. As to the fact that the goods of the defendant were stowed underneath those of other parties, see Leer *v.* Yates, 3 Taunt. 387; Harman *v.* Gandolph, Holt, N. P. 35. But see Lord Tenterden, in Dobson *v.* Droop, 1 Mood. & Mal. 441. By a prohibition of intercourse between the ship and the shore, on account of infectious disease, see Barker *v.* Hodgson, 3 Maul. & Sel. 267. So, where the delay was owing to frost. Barret *v.* Dutton, 4 Campb. 333. Or to the act of a foreign government, in prohibiting the exportation of the goods stipulated. Blight *v.* Page, 3 Bos. & Pul. 295, n. a. To the regulations of the custom-house. Hill *v.* Idle, 4 Campb. 327. Or the unlawful act of the custom-house agents. Bessey *v.* Evans, 4 Campb. 131. On the other hand, in Rogers *v.* Hunter, 1 Moo. & Mal. 63, Lord *Tenterden* remarked, in reference to the foregoing decisions: "I have great difficulty in saying, that, when the consignee has had no opportunity of taking his goods within the time stipulated, he is bound by the contract to pay for not doing so; he cannot, I think, in that case, be said to detain the vessel. On the other hand, I do not agree to the proposition that he has necessarily the stipulated time, to be computed from the period when the discharge of his own goods can be commenced; I think, after that period he must use reasonable dispatch. The true principle seems to be this: If the goods of the particular consignee are not ready for discharge at the time of the ship's arrival, he must have a reasonable time for removing them after they are so; if in such a case, using reasonable despatch, he cannot clear them within the stipulated period from the ship's being ready to discharge her cargo generally, he will not be liable for demurrage till the expiration of such reasonable time; but when it is expired, he will be liable, though the stipulated period, if computed from the time when the discharge of his own goods could have commenced, is not at an end." In this country, the equitable doctrine of Lord Tenterden seems to have met with approval. Thus, in Douglas *v.* Moody, 9 Mass. 555, the court say: "As to the demurrage, a detention by capture is not demurrage. A covenant to pay for demurrage applies to a detention voluntary in the party contracting for the freight." If the delay be owing to the act of the ship-owner or his agent, no demurrage, of course, is payable. Barker *v.* Hodgson, *supra;* Benson *v.* Blunt, 1 Ad. & Ell. N. S. 870. Where it is agreed that demurrage shall be paid for the time during which a ship is detained to take on board her cargo, the claim ceases so soon as she is loaded and cleared, although, owing to adverse weather, she cannot put to sea, or is driven back into port. And it was so held in a case where the delay caused by the freighters appears to have been the ultimate cause of the subsequent detention, by keeping the vessel in port until the season for navigation was almost closed. Jamieson *v.* Laurie, 6 Bro. P. C. 474, and Abbott, p. 315, where a British vessel was detained in St. Petersburg, to take on board her cargo, nearly two months beyond the stipulated time, and then setting sail, was driven back and frozen in for the winter, which began somewhat earlier than usual. Demurrage in this case was awarded only to the sailing of the vessel. And so, where, by the delay, the vessel lost the opportunity of sailing with convoy, and was obliged to wait nearly two months for another, the owner having covenanted that she should sail with convoy. Connor *v.* Smythe, 5 Taunt. 654. A similar rule was adopted where demurrage was stipulated to be paid whilst the ship was waiting for convoy. See Lannoy *v.* Werry, 4 Bro. P. C. 630. These cases appear to illustrate the principle that the freighter is not responsible, at least in this form of action, for any consequential injury, to the ship-owner, arising from the delay. See Clendaniel *v.* Tuckerman, 17 Barb. 184.

[2] Douglas *v.* Moody, 9 Mass. 555. See preceding note.

by seizure, embargo, or capture, and the impediment is removed, and the ship completes her voyage, the charterer pays for the whole time.[1] If she be condemned,[2] or otherwise lost, this terminates the voyage and the contract.

The contract may be dissolved by the parties, by mutual con-

[1] So held in the following cases, as to capture: Odlin *v.* Ins. Co. of Penn. 2 Wash. C. C. 312; The Ship Nathaniel Hooper, 3 Sumn. 542; Patron *v.* Silva, 1 Miller, (Louis.) 277; Spafford *v.* Dodge, 14 Mass. 66. See *post*, n. 2, *infrà*. But see The Hiram, 3 Rob. Adm. 180. For the application of the doctrine to embargo, see Bork *v.* Norton, 2 McLean, 422; M'Bride *v.* Marine Ins. Co. 5 Johns. 308; Palmer *v.* Lorillard, 16 id. 357; Baylies *v.* Fettyplace, 7 Mass. 325; Hadley *v.* Clarke, 8 Term, 259. A distinction appears, however, to have been taken in some of the English cases, between the effect of an embargo upon British vessels, upon contracts of affreightment between British subjects, and one imposed upon the ships of a foreign nation, "by way of hostility and reprisal." Thus, in Touteng *v.* Hubbard, 3 Bos. & Pul. 291, Lord Alvanley held that the contract of affreightment between the British merchants and the owner of a Swedish vessel, was dissolved by a hostile embargo on all Swedish ships; admitting, however, that, had the embargo been laid on by a third State, it might, perhaps, have only produced a suspension of the contract. And in the three cases, of Conway *v.* Gray, Conway *v.* Forbes, and Mowry *v.* Shedden, cited in Park on Ins. (6th ed.) p. 610, Lord Ellenborough held that an American citizen could not recover from a British underwriter, under an abandonment founded upon the embargo imposed by the American government. These cases, it was remarked by Chief Justice Kent, in McBride *v.* Mar. Ins. Co. *supra*, seem to have been decided rather upon political considerations than upon any principle of law. The case of The Isabella Jacobina, 4 C. Robins. 77, (Adm. R.) also came up under the Swedish embargo; but the decision in this case appears to have turned, partly at least, upon the fact, that the cargo, one of "pilchards," could not wait till the embargo might be taken off. A blockade of the port of departure suspends, but does not dissolve the contract. So held in this country, in Palmer *v.* Lorillard, *supra*, overruling 15 Johns. 14. See also Ogden *v.* Barker, 18 Johns. 87. And Richardson *v.* Maine Ins. Co. 6 Mass. 102, 118. In Stoughton *v.* Rappelo, 3 Serg. & Rawle, 559, the court held, in direct opposition to Ogden *v.* Barker, *supra*, that the right of the master to retain the goods was destroyed by the blockade, his remedy, if any, being by action on the case, without, however, expressly deciding that the contract of affreightment was dissolved.

[2] See Spafford *v.* Dodge, 14 Mass. 66. The effects of the hostile seizure of a vessel on the contract of charter-party, are thus stated by Justice *Jackson*, in this case, where the charterers were owners *pro tempore*: "Here was a hostile seizure of the ship. This might have been followed by a condemnation as prize, which would undoubtedly have dissolved the contract of affreightment; but in the events which have happened, it produced only a prolongation of the voyage. The ship was restored by the sovereign under whose authority she was seized. The captors, therefore, admit that they had no right to condemn the property, or to deal with it as captured. It makes no difference that the ship was carried into a port of the captors, for examination, before she was restored. If this seizure produced a dissolution of the charter-party, the same consequence would follow, however short might be the period of the detention, and whether she was restored by the captors upon examination of her papers at sea, or upon a like examination in port, or in a court of admiralty. We must not confound this contract with that contained in a policy of insurance. The assured may, during such a detention, abandon the ship to the insurers, and recover as for a total loss; because the insurers have agreed that, in case of such an interruption of his voyage, whilst it is uncertain how soon it can be resumed, or whether it can ever be further prosecuted, he may disembarrass himself of the adventure, and that they will pay him for the ship, and take the future risk upon themselves. But the owner of the ship makes no such contract with the hirer, in a common charter-party of affreightment. He is to be paid for the whole time the ship is out of his possession, in virtue of the contract, whether her voyage be long or short, and by whatever accident she may be delayed; provided the delay do not arise from his own default, and provided also, that the voyage be finally completed."

sent, or against their consent by any circumstance which makes the fulfilment of the contract illegal;[1] as, for example, by a declaration of war on the part of the country to which the ship belongs, against that to which she was to go.[2] So, either an embargo,[3] or an act of non-intercourse,[4] or a blockade of the port to which the ship was going,[5] may either annul or suspend the contract of charter-party. And we should say they would be held to suspend only, if they were temporary in their terms, and did not require a delay which would be destructive of the purposes of the voyage.

In reference to all these points, it is to be understood that if the parties know the circumstance when they make their bar-

[1] See Odlin *v.* Ins. Co. of Penn. 2 Wash. C. C. 312; Palmer *v.* Lorillard, 15 Johns. 14, and 16 id. 348; Baylies *v.* Fettyplace, 7 Mass. 338, per Sedgwick, J.; Browne *v.* Delano, 12 Mass. 370; Barker *v.* Hodgson, 3 Maule & Sel. 267; Liddard *v.* Lopes, 10 East, 526; Evans *v.* Hutton, 6 Jurist, 1042. But it has been held that the prohibition of a foreign government to export the articles of which the cargo was to be composed, did not dissolve the contract or excuse its non-performance. Blight *v.* Page, 3 Bos. & Pul. 295, n. (*a*,) and Abbott, p. 597. See also Sjoerds *v.* Luscombe, 16 East, 201, and Richardson et al. *v.* Marine Ins. Co. 6 Mass. 112. "Because the municipal laws of any State have not the force of laws without its jurisdiction, voyages prohibited in one State are not in any other State deemed for that reason to be illegal." Per *Parsons*, C. J.

[2] Abbott on Ship. 596; Palmer *v.* Lorillard, 16 Johns. 356, 357. But the breaking out of hostilities between the nation to which either the ship or cargo belongs, and any other nation to which they are not destined, does not dissolve the contract. Abbott on Ship. p. 596.

[3] "An embargo," said Chief Justice *Kent*, in M'Bride *v.* Marine Ins. Co. 5 Johns. 299, 308, "is not required to be, upon the face of the act, definite as to time. It is frequently otherwise; and the case of the British embargo on vessels bound to Leghorn, as stated in Hadley *v.* Clarke, 8 Term, 259, is a pertinent and strong instance of the kind. But it is, from the very nature and policy of the measure, a temporary restraint. It suspends, but does not dissolve the contract of insurance, any more than the contract to carry goods. The error of the counsel for the defendants consists in considering the embargo imposed by congress as a permanent prohibition, working a dissolution of the contract. We must judge of the act from what it purports to be, and from the terms which it uses. An embargo '*ex vi termini*' means only a temporary suspension of trade. A general and permanent prohibition of trade would not be an embargo." See *ante*, p. 365, n. 1.

[4] "When the sovereign of the country to which the ship belongs shall prohibit his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country, or be made by an express ordinance for any cause at the will of the sovereign, a voyage to that country for the purpose of trade is illicit." Per *Parsons*, C. J., in Richardson et al. *v.* Marine Ins. Co. 6 Mass. 111. See also Palmer *v.* Lorillard, 16 Johns. 356. "There is no difference in principle," says Chancellor *Kent*, (3 Comment. 249,) "between a complete interdiction of commerce, which prevents the entry of the vessel, or a partial one in relation to the merchandise on board, which prevents it from being landed." Patron *v.* Silva, 1 Mill, (Lou.) 277. So where the cargo is prohibited from exportation. Barker *v.* Hodgson, 3 M. & S. 267.

[5] A blockade of the port of destination, by rendering the voyage to such port in a certain sense illegal, would appear on principle to have the effect of dissolving the charter-party, (see n. 1, *supra*,) and accordingly this has been held to be its effect in several cases. See Scott *v.* Libby, 2 Johns. 336; The Tutela, 6 Rob. 177. As to the effect of a blockade of the port of departure, see *ante*, p. 365, n. 1.

gain, and provide for it, any bargain they choose to make in relation to it would be enforced, unless it required one or other of the parties to do something prohibited by the law of nations, or of the country in which the parties resided, and to whose tribunals they must resort.[1]

SECTION VIII.

OF GENERAL AVERAGE.

Whichever of the three great mercantile interests — ship, freight, or cargo — is voluntarily lost or damaged for the benefit of the others, if the others receive benefit therefrom, they must contribute ratably to the loss. That is to say, such a loss is averaged upon all the interests and property which derive advantage from it. This rule is ancient and universal.[2]

The loss must be voluntary. Therefore, if the cargo be actually thrown over, and the ship saved thereby, or if the ship be

[1] "Every engagement to perform a future act is in one sense conditional. If it becomes impossible by any act not imputable to the party who is bound to perform it, unless he assumes the risk of all contingencies, he is excused." Per *Ware*, in The Eliza, Daveis, 316. Where the master of a ship covenanted in a charty-party to go to a certain port of America and receive a loading from the freighter, with the exception of the restraints of rulers, &c., but the freighter covenanted absolutely to provide the loading, without any such exception, Lord Ellenborough was of opinion that an embargo in the American port, which prevented the freighter from loading the ship, did not discharge him from his covenant. Sjoerds *v.* Luscombe, 16 East, 201. "Supposing," said his lordship, "all the facts stated appeared upon the records, the restraint of the government would not operate as an excuse for the freighter, who was to load the goods on board at all events, even if, by the law of the country, it could not be done, but only for the ship-owner, who covenanted with that exception. I assume the fact that nothing but the embargo prevented the loading of the cargo; but the result of Blight *v.* Page, (3 Bos. & Pul. 295, in note,) is, that if the freighter undertakes what he cannot perform, he shall answer for it to the person with whom he undertakes."

[2] The doctrine of average is supposed to be derived from the ancient Rhodian law. In the Digest, it is recognized as the Lex Rhodia. Dig. 14, 2, 1. The rule, as there laid down, is this: "If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all." The doctrine has been much discussed by foreign writers, and various rules respecting it have been adopted in foreign ordinances. Laws of Oleron, art. 8, 9; Ord. of Wisbuy, art. 20, 21, 38; French Ord. liv. 3, tit. 8; Cod. de Com., art. 410; Emerigon, ch. 12, § 39; Consolato del Mare, cap. 47, 48, 49; Le Guidon, ch. 5, art. 28; 2 Valin, 167; Beawes, 165. But the numerous decisions upon questions of average, in the English and American courts, are now the sources from which the law of average must be chiefly derived. The history of the law of average is most thoroughly considered by Mr. Justice Story, in The Columbian Ins. Co. *v.* Ashby, 13 Pet. 343. The question has been raised, whether the principles of general average apply to a case of jettison on inland waters. Rossiter *v.* Chester, 1 Doug. (Mich.) 154. On principle, we have no doubt that they should be so applied. See also Welles *v.* Boston Ins. Co. 6 Pick. 182, for an instance of general average in fire insurance.

actually cast ashore, and the goods saved thereby, yet, if in the first case the cargo could not possibly have been saved, and if in the second case, the ship could not possibly have been saved, there is no average. We distinguish this from the cases where *all* cannot possibly be saved, but something may be if something else is sacrificed. Here there is no doubt that the thing lost by voluntary choice is to be paid for. But, while we admit that the question is one of much difficulty, as well as of uncertainty on the authorities, we incline to say that the loss must be *voluntary;* and if the peril of any one whole thing is such that its safety is impossible, the destruction of it in a way to insure the safety of the rest is not such a *voluntary* loss or sacrifice as would give a claim for indemnity. There have been many cases, and some conflict, respecting the voluntary stranding of the ship. But there ought to be no doubt whatever about the principle, whatever may be the difficulty of applying it in different cases. If the ship must be lost in that tempest, and only a place is selected favorable to the safety of life and cargo, there can be no average. But if the ship, although in imminent danger, may be saved, and a substantial chance of safety is voluntarily given up for the sake of the cargo, there must be an average.[1] If a ship is accidentally

[1] Two questions have given rise to much discussion in cases where a claim for average has been made for the benefit of a ship which has been voluntarily stranded. 1. Can there be a voluntary stranding so as to give a claim for average, if the vessel would have perished at any rate? 2. Do the ship-owners have a claim for average, if a vessel is voluntarily stranded, and cannot be got off, so that she is totally lost? Both of these questions have been settled in the Supreme Court of the United States, by most elaborate decisions. The Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, and Barnard *v.* Adams, 10 How. 270. In the arguments and decisions in these two cases, the law on these questions seems to be exhausted. Upon the first question, *Grier,* J., in Barnard *v.* Adams, said: "In order to constitute a case for general average, three things must concur: 1st. A common danger, or a danger in which ship, cargo, and crew all participate, — a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder. 2d. There must be a voluntary jettison, *jactus,* or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causâ;* or, in other words, a transfer of the peril from the whole to a particular portion of the whole. 3d. This attempt to avoid the imminent common peril must be successful. It is evident from these propositions, that the assertion so much relied on in the argument, namely, 'that if the peril be inevitable, there can be no contribution,' is a mere truism, as the hypothesis of the case requires that the common peril, though imminent, shall be successfully avoided. Those who urge it must therefore mean something else; and it seems, when more carefully stated, to be this, 'that if the common peril was of such a nature that the '*jactus,*' or thing cast away to save the rest, would have perished anyhow, or perished 'inevitably,' even if it had not been selected to suffer in place of the whole, there can be no contribution." The cases of Caze *v.* Reilly, 3 Wash. C. C. 298; Sims *v.* Gurney, 4 Binney, 513; and Gray *v.* Waln, 2 Serg. & Rawle, 229; supported substantially the doctrine of the two cited above. See also Reynolds *v.* Ocean Ins. Co. 22 Pick. 197. But the cases of Meech *v.* Robinson,

stranded, and got off, and the voyage resumed, and ship, cargo, and freight saved, all must contribute to the expense of getting her off.[1] So, if she be stranded near her port of destination, and the cargo be transported thither in lighters, this expense is a matter of average.[2] So would be any sea damage sustained by the goods in the lighters.[3]

So the loss must not only be voluntary, but, what is indeed implied in its being voluntary, it must be for the purpose and with the intention of saving something else. And this intention must be carried into effect; for only the interest or property which is actually saved can be called to contribute for that which was lost.[4]

Any loss which comes within this reason, is an average loss; as ransom paid to a captor or pirate; not so, however, if he take what he will, and leave the ship and the rest, for here is no contribution.[5] So, cutting away bulwarks or the deck, to get at goods for jettison, is an average loss.[6] So is a damage which, though not intended, is the direct effect and consequence of an act which was intended; as, where a mast is cut away, and by

4 Whart. 360, Walker *v.* United States Ins. Co. 11 Serg. & Rawle, 61, and Crockett *v.* Dodge, 3 Fairf. 190, support the doctrine that, if, at the time of the sacrifice of the ship, there was no possibility of saving it, there will be no average. In Bradhurst *v.* Columbian Ins. Co. 9 Johns. 9, it was held that, if a ship in a case of extremity, and to avoid impending danger, be voluntarily run ashore, and she is afterwards recovered and performs the voyage, the damages resulting from this sacrifice are to be borne as general average; but if the ship should happen to be destroyed by so running ashore, then there is no contribution from the surviving cargo. The opinion of the court in that case was delivered by Mr. Chief Justice Kent, and gave evidence of much thought, and of a careful examination of authorities. But the decision in Columbian Ins. Co. *v.* Ashby, delivered by Mr. Justice Story, with the light derived from the decision of Bradhurst *v.* Columbian Ins. Co., and from a thorough examination of the foreign authorities, was directly opposed to it.

[1] Bedford Com. Ins. Co. *v.* Parker, 2 Pick. 1. If the stranding were voluntary, and the ship recovered, it seems to be well settled that the expense would be a subject of general average. Bradhurst *v.* Columbian Ins. Co. 9 Johns. 13; Reynolds *v.* Ocean Ins. Co. 22 Pick. 199.

[2] Heyliger *v.* N. Y. Firemen's Ins. Co. 11 Johns. 85.

[3] Lewis *v.* Williams, 1 Hall, 430.

[4] Scudder *v.* Bradford, 14 Pick. 13; Williams *v.* Suffolk Ins. Co. 3 Sumner, 510. In the latter case, *Story*, J., said: "The expenses and charges of going to a port of necessity to refit, can properly be a general average only where the voyage has been, or might be resumed." In Butler *v.* Wildman, 3 B. & Ald. 398, dollars were thrown overboard from a vessel which was on the point of being captured, to save them from the enemy. This was admitted by counsel not to be a case of general average.

[5] Dig. 14, 2, 2, 3. So the necessary expenses incurred in procuring the restoration of a ship and cargo, after capture, are allowed as general average. Spafford *v.* Dodge, 14 Mass. 66; Douglas *v.* Moody, 9 Mass. 548. In Price *v.* Noble, 4 Taunt. 122, it was held that a jettison, made while the vessel and cargo were in the hands of the enemy, would support a claim for general average.

[6] Dig. 14, 2, 2, 1; Molloy b. 2, c. 6, § 15; Laws of Wisbuy, art. 55; Abbott on Ship. 580.

reason of it, water gets into the hold and damages a cargo of corn, this damage is as much a general average as the loss of the mast.[1]

But if a ship makes all sail in a violent gale to escape a lee shore, and so saves ship and cargo, but carries away her spars, &c.; or if an armed ship fights a pirate or enemy, or beats him off at great loss; the first is a common sea risk,[2] the second a common war risk,[3] and neither of them is a ground for average contribution.

It is not considered prudent to lade goods on deck, because they are not only more liable to loss there, but hamper the vessel, and perhaps make her top-heavy, and increase the common danger for the whole ship and cargo. Therefore, by the general rule, if goods on deck are *jettisoned*, (or cast overboard,) they are not to be contributed for.[4] But there are some voyages on which there is a known and established usage to carry goods of a certain kind on deck. This justifies the carrying them there, and

[1] In Maggrath *v.* Church, 1 Caines, 196, the vessel, loaded with corn, encountered severe weather, and a mast was cut away for the general preservation. In consequence of the cutting away the mast, the corn was injured by the water. *Kent*, J., said: "The corn being damaged by the cutting away of the mast, is to be considered, equally with the mast, a sacrifice for the common benefit—a price of safety to the rest; and it is founded on the clearest equity, that all the property and interest saved, ought to contribute their due proportion to this sacrifice."

[2] Power *v.* Whitmore, 4 M. & S. 141; Covington *v.* Roberts, 2 B. & P. N. R. 378. In the latter case, a vessel was captured by a French privateer, but, on account of a heavy gale, the privateer could not take possession of her. To escape from the privateer, she carried an unusual press of sail. She succeeded in escaping, but was much strained, most of her seams were opened, and the head of her mainmast was carried away. Held, that the damage to the vessel was not a subject for general average. Sir *James Mansfield*, C. J., said: "This is only a common sea risk. If the weather had been rather better, or the ship stronger, nothing might have happened."

[3] In Taylor *v.* Curtis, 6 Taunt. 608, a vessel resisted a privateer, and finally beat her off. The losses suffered were claimed as general average. The claim was not allowed. *Gibbs*, C. J., said: "The losses for which the plaintiffs seek to recover this contribution, are of three descriptions. 1. The damage sustained by the hull and rigging of the vessel, and the cost of her repairs. 2. The expense of the cure of the wounds received by the crew in defending the vessel. 3. The expenditure of powder and shot in the engagement. The measure of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there, it seems to me, they ought to rest." Mr. Flanders, in his able work on Maritime Law, is inclined to doubt whether this decision should be adopted by the American courts.

[4] Smith *v.* Wright, 1 Caines, 43; Lenox *v.* United Ins. Co. 3 Johns. Cas. 178; Dodge *v.* Bartol, 5 Greenl. 286; Cram *v.* Aikin, 13 Maine, 229; Hampton *v.* Brig Thaddeus, 4 Martin, 582; Taunton Copper Co. *v.* Merchants' Ins. Co. 22 Pick. 108; Doane *v.* Keating, 12 Leigh, 391. The same rule prevails, generally, upon the continent. Ord. Louis 14, tit. Jettisons, a. 13; Code de Commerce, a. 232; Valin, vol. 2, p. 203. See also Abbott on Ship. (8th Eng. Ed.) 482, where there is an elaborate note on this subject.

then the jettison of them would seem to entitle the owner to contribution.[1]

The repairs of a ship are for the benefit of the ship itself. But if a ship be in a damaged condition, at a port where she cannot be permanently repaired, and receive there a temporary repair, which enables her to proceed to another port, where she may have a thorough repair, and thereby the voyage is saved, all of the first repair, which was of no further use than to make the permanent repair possible, is to be contributed for by ship, freight, and cargo.[2]

If a ship put into a port for necessary repair, and receive it, and the voyage is by reason thereof successfully prosecuted, the wages and provisions of the crew, from the time of putting away for the port, the expense of loading and unloading, and every

[1] This doctrine does not appear to be settled in the American courts. But it was thoroughly discussed in England in Milward *v.* Hibbert, 3 Q. B. 120. In that case, pigs were shipped on deck from Waterford, in Ireland, to London, in accordance with a usage so to do. They were thrown overboard for the general safety. The owners of the steamboat paid their proportional part of the contribution in general average, and brought an action against their insurers to recover it. The insurers were held liable. In Gould *v.* Oliver, 4 Bingh. N. C. 134, it had been held, that where goods were carried on deck with the consent of the shipper, the ship-owner was liable to contribute in case of jettison, but the doctrine had not been extended so as to charge the shippers of goods below deck. The decision in Mildward *v.* Hibbert, did not expressly carry the doctrine so far as that, but the principles there laid down would seem to make goods shipped in the hold chargeable. The exception stated in the text seems in some cases to be adopted in practice in America, although not directly sanctioned by our courts. See Phillips on Ins. vol. 2, § 1282, and Cram *v.* Aikin, 13 Maine, 229. Valin, (vol. 2, p. 203,) says that contribution is allowed for the jettison of goods on deck, in case of boats or other small vessels going from port to port, or in cases where this mode of stowing is sanctioned by custom. But see Dodge *v.* Bartol, 5 Greenl. 286, and Cram *v.* Aikin, 13 Maine, 229.

[2] In Brooks *v.* Oriental Ins. Co. 7 Pick. 259, the vessel received repairs at Balize, to enable her to complete her voyage. They were charged to the general average. *Putnam*, J., said: "As to the third question, it is contended for the defendants that the temporary repairs should be charged to general average; and we are referred to Plummer *v.* Wildman, 3 Maule & Selwyn, 482, which, in several particulars, resembles the case at bar. The ship had been run foul of, and so much damaged as to make it necessary to return to her port to repair, to enable her to perform the voyage, and she was afterwards completely repaired at the end of the voyage. The expenses of repairs which were made abroad, which were strictly necessary to enable the ship to perform her voyage, were placed to the account of general average. *Bayley*, J., doubted whether the repair of a particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship. The court considered these repairs only under the account of general average, which were absolutely necessary for the enabling of the ship to pursue her voyage; and all beyond were to be set down to the account of the ship. "Therefore, deducting the benefit, if there be any, which still results to the ship from the repair, the rest may be placed to the account of general average." See Padelford *v.* Boardman, 4 Mass. 548, where it was held that repairs generally do not go to the account of general average. See also Jackson *v.* Charnock, 8 Term, 509. In the case of Plummer *v.* Wildman, cited above, the injury on account of which the vessel was obliged to seek the port of refuge, was itself the subject of general average, and that may have influenced the decision under the principles adopted in the English cases, but in this country, no distinction appears to rest upon that fact.

other necessary expense arising from this need of repair, seems, by the best authority, to be an average. Nor do we, in this country, refuse an average where the repair was made necessary by a common sea peril, and allow one where the repair was required by a voluntary loss, as the cutting away of a mast, or the like.[1]

As to the expenses, wages, &c., during a capture, or a detention by embargo, it is not quite certain what the rule is. We should prefer to limit the claim for contribution to those expenses which were necessarily and successfully incurred, in saving or liberating the property.[2]

In regard to the rules or principles for estimating the contributory interests, — how, that is to say, the value of the ship, or of

[1] The cases of Power *v.* Whitman, 4 M. & Selw. 141, and of Plummer *v.* Wildmore, 3 M. & Selw. 482, seem to have left this question in some doubt in England. The most satisfactory rule which can be deduced from them, appears to be this:—If the injury which led the vessel to seek a port of refuge, was itself a subject for general average, then the wages and provisions of the crew, and other expenses during the detention, will give a claim for contribution; but if the injury did not give a claim for contribution, the expenses and wages, and provisions of the crew will not. But see 3 Kent's Comm. 235, where a different rule is deduced from these cases. In America, it seems to be well settled, that the wages and provisions of the crew, and other expenses, from the time a vessel leaves its course to seek a port of refuge, are to be contributed for. Padelford *v.* Boardman, 4 Mass. 548; Walden *v.* Leroy, 2 Caines, 263; Barker *v.* Phœnix Ins. Co. 8 Johns. 307; Dunham *v.* Com. Ins. Co. 11 Johns. 315; Jones *v.* Ins. Co. of N. A. 4 Dallas, 246; Brooks *v.* Oriental Ins. Co. 7 Pick. 259; Thornton *v.* U. S. Ins. Co. 3 Fairf. 150; Potter *v.* Ocean Ins. Co. 3 Sumn. 27. But see Weightman *v.* Macadam, 2 Brev. 230; Perry *v.* Ohio Ins. Co. 5 Ohio, 306.

[2] M'Bride *v.* Mar. Ins. Co. 7 Johns. 431; Penny *v.* N. Y. Ins. Co. 3 Caines, 155; The doctrine of the text was also sustained, after much discussion, in Spafford *v.* Dodge, 14 Mass. 66. The vessel was detained as a prize several months. A contribution was claimed for the wages and provisions of the crew during the detention. *Jackson*, J., in delivering the opinion of the court, said: "As to the wages and provisions of the crew during the detention, we are unable, notwithstanding the very respectable authorities cited in support of this claim, to see any ground upon which we can allow it, consistently with the established principles on this subject, and the course of decisions in this State. The only case in which the charge has been allowed, in an account of general average, in our courts, was when it was necessary to go into port to repair damages sustained during the voyage, from the perils of the sea; and the master, for that reason, voluntarily sought a port to refit. Here, it is to be observed, the delay was voluntarily incurred by the master; the mind and agency of man were employed in producing it; and this circumstance is deemed essential in every case of general average, in contradistinction to such unavoidable detentions and losses, as arise from accident beyond the control of the master. We see no ground of distinction, in this respect, between a temporary detention occasioned by a hostile seizure, and one which is occasioned by an embargo, or by a tempest, or other common peril of the sea. . . . The shipowner might as well claim a contribution for the wear and tear of his ship during the detention, or the owner of the cargo for the interest of his money, for the deterioration of his merchandise, or for the loss of a market by the delay, as the owner of the freight for the extraordinary wages and provisions expended on such an occasion." It seems difficult to resist the force of this reasoning. But there are earlier cases in which contrary decisions have been made. Ins. Co. of N. A. *v.* Jones, 2 Binn. 547; Leavenworth *v.* Delafield, 1 Caines, 573. See Walden *v.* Leroy, 2 Am. Lead. Cas. 404, where this question is considered with care.

the freight, or of the cargo, is to be ascertained,—it is to be regretted that we have nothing like uniformity in the usages of different parts of this country. Perhaps this cannot be determined in any better way than by an arbitrary rule, or estimate; but there are many such rules in the law of insurance and shipping; and we believe it would be well if the rules applied by the courts in New York, (which are stated in our notes,) should be generally received. If any one place should have the right and authority of a commercial metropolis, it would seem to be that where the greater extent of commerce brings up such questions most frequently, and where the practical bearing of any rule is likely to be best illustrated.[1]

[1] The contributory value of the ship was held in some cases to be her value at the commencement of the voyage, deducting one fifth for supposed deterioration. Leavenworth *v.* Delafield, 1 Caines, 573; Gray *v.* Waln, 2 Serg. & R. 229. But this rule never has been adopted in Massachusetts. Spafford *v.* Dodge, 14 Mass. 66; Douglas *v.* Moody, 9 Mass. 548. And it seems not to have been applied in a late case in New York. In Mutual Safety Ins. Co. *v.* Cargo of Ship George, 8 Law Rep. 361, the value at the port of departure, deducting the actual wear and tear, was held her contributory value. See also Bell *v.* Smith, 2 Johns. 98. But in cases of jettison of goods, where the vessel arrives in safety, the rule adopted, both in England and generally in this country, seems to be to take the value at the end of the voyage. 3 Kent, 243; Abbott on Ship. (8th Eng. ed.) 503. Where masts, sails, or cables, or other parts of the equipment of a ship are lost, one third is deducted from the cost of the new articles, and the remainder is contributed for. Strong *v.* Firemen's Ins. Co. 11 Johns. 323; 3 Kent, 243. The freight pending contributes, after deducting the expenses of earning it. Williams *v.* London Ass. Co. 1 M. & S. 318. But if only *pro rata* freight is earned, that only contributes. Maggrath *v.* Church, 1 Caines, 196; The Nathaniel Hooper, 3 Sumner, 542. If no freight is eventually earned, there is no contribution on account of it. Potter *v.* Washington Ins. Co. 4 Mason, 298; Tudor *v.* Macomber, 14 Pick. 34. In Massachusetts, and generally in the United States, one third is deducted from the gross freight for seamens' wages and other expenses. Bedford Com. Ins. Co. *v.* Parke, 2 Pick. 1; Humphreys *v.* Union Ins. Co. 3 Mason, 439, per *Story*, J. But in New York, the rule seems to be to deduct two thirds. Leavenworth *v.* Delafield, 1 Caines, 873; Heyliger *v.* N. Y. Firemens' Ins. Co. 11 Johns. 85. If a vessel is wrecked and the cargo transshipped, the contributory value of the freight is the excess of its amount over the amount paid the other vessel. Searle *v.* Scovell, 4 Johns. Ch. 218; Dodge *v.* Union Ins. Co. 17 Mass. 471. The cargo, if the vessel arrives at the port of destination, contributes its net value at that place. Barnard *v.* Adams, 10 How. 270. But, if a jettison takes place, and the vessel returns to the port of departure, or some neighboring port, then the invoice price is to be taken, or the market value at that place. Tudor *v.* Macomber, 14 Pick. 84; Mutual Safety Ins. Co. *v.* Cargo of Ship George, 8 Law Rep. 361. In Tudor *v.* Macomber, a cargo of ice was shipped from Boston to Charleston, S. C. The vessel ran ashore on Cape Cod, the ice was thrown overboard to save her from destruction, and the voyage was broken up. As no freight was earned, no contribution was made on account of it. The value of the ice was taken as stated in the bill of lading, there being no invoice. *Putnam*, J., said: "If the goods had arrived at the port of destination in safety, the owner would have realized the price there. He suffers just so much loss as was caused by the jettison, which could be there accurately estimated. And the freight would then be brought into the contribution. But when, as in the case at bar, the voyage is broken up near the port of departure, and the vessel has not adopted an intermediate port as and for the port of destination, but has returned home, and the freight has not been saved by the jettison, the contribution to the general average loss, should be between the ship and the cargo, upon the assumed value of the cargo at the port of departure. This, we think, furnishes an exact rule; whereas the adopting the value at the port of destination would, in such a case, be uncertain,—depending upon matters of opinion instead of matters of certainty."

It is the master's duty to have an average adjustment made at the first port of delivery at which he arrives. And an adjustment made there, and especially if this be a foreign port, is generally held to be conclusive upon all parties.[1] For the purpose of this rule, our States are foreign to each other; as they are indeed for most purposes under the Law of Admiralty, or the Law of Shipping.[2] But a foreign adjustment might doubtless be set aside or corrected, for fraud or gross error; and our courts differ somewhat in the degree in which they regard it as conclusive.[3]

It is universally admitted that the master has the right of refusing delivery of the goods, until the contribution due from them on general average, is paid to him. That is, he cannot hold the whole cargo, if it belong to different consignees, until the whole average is paid; but he may hold all that belongs to each consignee, until all that is due from that consignee is paid.[4] And in this country the doctrine has been carried so far, that the master may retain property belonging to the United States, until the average contribution due upon it has been paid.[5]

As the purpose of average and contribution is to divide the loss proportionably over all the property saved by it, the whole amount which any one loses is not made up to him, but only so much as will make his loss the same per centage as every other party suffers. Thus, if there be four shippers, and each has on board $5,000, and the ship is worth, (for the purpose of the adjustment,) $15,000, and the freight $5,000, and all the goods of one shipper are thrown over; now the whole contributing in-

[1] Strong *v.* Firemen's Ins. Co. 11 Johns. 323; Simonds *v.* White, 2 B. & C. 806; Peters *v.* Warren Ins. Co. 1 Story, 463; Depau *v.* Ocean Ins. Co. 5 Cowen, 63; Loring *v.* Neptune Ins. Co. 20 Pick. 411; Thornton *v.* U. S. Ins. Co. 3 Fairf. 153. In delivering the opinion in Simonds *v.* White, *Abbott*, C. J., said: "The shipper of goods, tacitly, if not expressly assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average, he must be understood also to assent to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us, to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made."

[2] Lewis *v.* Williams, 1 Hall, (N. Y.) 430.

[3] The extract above from the opinion of *Abbott*, C. J., in Simonds *v.* White, places the binding force of a foreign adjustment upon the implied contract to agree to it. This ground seems to be unobjectionable, as it leaves the adjustment open to attacks on account either of fraud or mistake.

[4] United States *v.* Wilder, 3 Sumner, 308; Chamberlain *v.* Reed, 13 Maine, 357; Eckford *v.* Wood, 5 Ala. 136; Simonds *v.* White, 2 B. & C. 805; Scaife *v.* Tobin, 3 Bar. & Ad. 523; The Hoffnung, 6 Rob. 383.

[5] United States *v.* Wilder, *supra*.

terest is $40,000, and the loss is one eighth of this. The shipper whose goods are jettisoned therefore loses one eighth of his goods, and the remaining seven eighths are made up to him, by each owner of property saved giving up one eighth.

There are usually in every commercial place, persons whose business it is to make up adjustments. As the losses usually consist of many items, some of which are general average and some rest on the different interests on which they fell, and as the contributory interests must all be enumerated, and the value of each ascertained according to the general principles of law, qualified, perhaps, by the local law or usage of the port, and then the average struck on all these items, it is obvious that this must be a calculation requiring great care and skill. And as the adjustment affects materially persons who may not be present, but specially represented, — for all these reasons only those who are known to be competent to the work should be employed to make this adjustment. The name given to such persons in France is *dèpacheur*, and this name is frequently used in other countries.

SECTION IX.

OF THE NAVIGATION OF THE SHIP.

1. *Of the powers and duties of the master.* — The master has the whole care and the supreme command of his vessel, and his duties are coequal with his authority. He must see to every thing that respects her condition; including her repair, supply, loading, navigation, and unloading. He is principally the agent of the owner; but is, to a certain extent, the agent of the shipper, and of the insurer, and of all who are interested in the property under his charge.

Much of his authority as agent of the owner, springs from necessity. He may even sell the ship, in a case of extreme necessity; so he may make a bottomry bond which shall pledge her for a debt; so he may charter her for a voyage or a term of time; so he may raise money for repairs, or incur a debt therefor, and make his owners liable. All these, however, he can do only from necessity.[1] If the owner be present, in person or by his

[1] "The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship; but is subject to

agent, or is within easy access, the master has no power to do any of these things. If he does them in the home port, the owner is liable only where by some act or words he ratifies or adopts the act of his master.[1] If in a foreign port, even if the owner were there, he may be liable on his master's contracts of this kind, to those who neither knew, nor had the means of knowing that the master's power was superseded or qualified by the presence of the owner.[2]

Beyond the ordinary extent of his power, which is limited to the care and navigation of the ship, he can go, as we have said, only from necessity. But this necessity must be greater for some purposes than for others. Thus he can sell the ship only in a case of extreme and urgent necessity; that is, only when it seems in all reason impossible to save her, and a sale is the only way of preserving for the owners or insurers any part of her value.[3] We say "seems;" for if such is the appearance at the

several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign ports, and, under certain circumstances, at home for necessary disbursements, and for repairs, and bind the owner for repayment; but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality, and condition of the goods. Constant usage shows that masters have that general authority; and if a more limited one is given, a party not informed of it is not affected by such limitation. "The master is a *general agent* to perform all things relating to the usual employment of his ship; and the authority of such an agent to perform all things *usual in the line of business in which he is employed*, cannot be limited by any private order or direction *not known* to the party dealing with him." Smith's Merc. Law, 59. Per *Jervis*, C. J., in Grant *v.* Norway, 10 C. B. 665, 687; 2 E. L. & E. 337. In that case it was held that a master has no authority to sign a bill of lading for goods which had never been shipped. See also Gen. Int. Ins. Co. *v.* Ruggles, 12 Wheat. 408.

[1] In The Schooner Tribune, 3 Sumner, 144, the master of a vessel made a charter-party at the home port. It was held, under the circumstances, to be binding on the owners. *Story*, J., said: "As to the right to make such a contract in the home port of the owners, I agree that it cannot be ordinarily presumed from his character as master. It is not incident to his general authority; nor can it be presumed, under such circumstances, as an ordinary superadded agency. But there are peculiar circumstances, however, in the present case, which do create some presumption of superadded agency. In the first place, such has been his authority in the former voyages of the vessel; and such seems also to have been his authority under her subsequent employment. And I think it might fairly be presumed, that in the home port he would scarcely have had the rashness to make so important and definitive a contract without some authority."

[2] In Ward *v.* Green, 6 Cow. 173, it was held, that the mere fact that an owner was on board as supercargo, did not free him from liability on contracts respecting freight, made by the master in a foreign port. The owner must show that he alone attended to the shipment of the cargo.

[3] Many cases have been decided upon the question what circumstances will justify a sale of a ship by the master. All the cases admit that it is not sufficient that the sale was *bonâ fide* and intended for the benefit of all concerned; it must have been *neces-*

time, when all existing circumstances are carefully considered and weighed, the sale is not void for want of authority, if some accident, or cause which could not be anticipated, as a sudden change in the wind or sea, enables the purchaser to save her easily.[1]

So to pledge her by bottomry; there must be a stringent and sufficient necessity, but it may be far less than is required to authorize a sale. It is enough if the money is really needed for

sary. We can find no better account of the circumstances, which will create such a necessity than the following by *Tindal*, C. J., in Somes *v.* Sugrue, 4 Car. & Payne, 276. "A great deal has been said about the word *necessity*. Undoubtedly, it is not to be confined to, or so strictly taken as it is in its ordinary acceptation. There can, in such a case, be neither a legal necessity nor a physical necessity, and therefore it must mean a *moral* necessity; and the question will be, whether the circumstances were such that a person of prudent and sound mind could have no doubt as to the course he ought to pursue. The point principally for consideration will be, the expenditure necessary to put the ship into a condition to bring home her cargo; the means of performing the repairs, and the comparison between those two things and the subject-matter which was at stake; and it must not be a mere measuring cast, not a matter of doubt in the mind, whether the expense would or would not have exceeded the value; but it must be so preponderating an excess of expense, that no reasonable man could doubt as to the propriety of selling under the circumstances instead of repairing. . . . . A captain has no power to sell, except from necessity, considered as an impulse, acting morally, to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. If he has no means of getting the repairs done in the place where the injury occurs; or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is justified in selling, as the best thing that can be done." The leading English cases in which this question has been discussed, are, Idle *v.* Royal Exch. Ass. Co. 8 Taunt. 755; Hayman *v.* Molton, 5 Esp. 65; Reid *v.* Darby, 10 East, 144; Robertson *v.* Clarke, 1 Bing. 445; Read *v.* Bonham, 3 Brod. & Bing. 147; Hunter *v.* Parker, 7 M. & W. 322; Ireland *v.* Thompson, 4 C. B. 149. The principal American cases are, Gordon *v.* Mass. F. & M. Ins. Co. 2 Pick. 249; The Schooner Tilton, 5 Mason, 465, 475; The American Ins. Co. *v.* Center, 4 Wend. 45; S. C. 7 Cow. 564; The Ship Fortitude, 3 Sumner, 254; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; American Ins. Co. *v.* Ogden, 15 Wend. 532; Winn *v.* Columbian Ins. Co. 12 Pick. 285; Robinson *v.* Commonwealth Ins. Co. 3 Sumner, 220; The New England Ins. Co. *v.* The Sarah Ann, 13 Pet. 387. If the circumstances are such as will admit of delay to consult the owners, the master cannot sell. The New England Ins. Co. *v.* The Brig Sarah Ann, 13 Pet. 387; The Brig Sarah Ann, 2 Sumner, 215; Scull *v.* Briddle, 2 Wash. C. C. 150; Hall *v.* Franklin Ins. Co. 9 Pick. 466; Peirce *v.* Ocean Ins. Co. 18 Pick. 83.

[1] The Brig Sarah Ann, 2 Sumner, 215; S. C. 13 Pet. 387; Fontaine *v.* Phœnix Ins. Co. 11 Johns. 293. In the case of The Brig Sarah Ann, the vessel had run upon the shore at Nantucket. She was stripped of her rigging, and then sold for $127. The sale by the master was held to be valid, although the vessel was gotten off by the purchasers, and repaired at a cost considerably less than her value when repaired. *Story*, J., said: "The fact that the brig was actually gotten off by the purchasers after the sale, is certainly a strong circumstance against the necessity of the sale. But it is by no means decisive; for we are not, in cases of this sort, to judge by the event, — for a vessel may be apparently in a desperate situation, and yet by some lucky accident, or unexpected concurrence of fortunate circumstances, she may be delivered from her peril. We must look to the state of things as it was at the time of the sale; and weigh all the circumstances, — the position and exposure of the brig; season of the year; the dangers from storms; the expense of any attempts to get her off; the probable chances of success; and the necessity of immediate action on the part of the master, one way or the other."

the safety of the ship, and cannot otherwise be raised, or not without great waste.[1]

So, to charter the ship, there must be a sufficient necessity, unless the master has express power to do this. But the necessity for this act may be only a mercantile necessity; or in other words, a certain and considerable mercantile expediency.[2]

So, to bind the owners to expense for repairs or supplies, there must also be a necessity for them. But here it is sufficient if the repairs or supplies are such as the condition of the vessel, and the safe and comfortable prosecution of the voyage, render proper.[3] Where the master borrows money, and the lender sues the owner, great stress is sometimes laid upon the question whether the captain was obliged to pay the money down. But we do not see in principle any great difference between incurring a debt for service or materials which the owner must pay, or incurring the same debt for money borrowed and applied to pay for the service or materials.[4]

[1] The Ship Fortitude, 3 Sumn. 228; The Ship Virgin, 8 Peters, 538; The Nelson, 1 Hagg, 169. In The Ship Fortitude, *Story*, J., said: "In relation to what are necessary repairs in the sense of the law, for which the master may lawfully bind the owner of the ship, I have not been able, after a pretty thorough search into the authorities and text writers, ancient and modern, to find it anywhere laid down in direct or peremptory terms, that they are such repairs, and such repairs only, as are absolutely indispensable for the safety of the ship or the voyage, — or that there must be an extreme necessity, an invincible distress, or a positive urgent incapacity, to justify the master in making the repairs. . . . . But a thorough examination of the common text writers, ancient as well as modern, will, as I think, satisfactorily show, that they have all understood the language in a very mitigated sense; and that *necessary repairs* mean such as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety of the ship or the accomplishment of the voyage." To authorize the master to give a bottomry bond, not only must the repairs be necessary in the sense of the word taken in the above extract, but it must appear that the funds for making them could not have been obtained on the credit of the owner alone. The Aurora, 1 Wheat. 96; The Randolph, Gilpin, 459. See *ante*, p. 341, n. 3, and Reade *v.* Com. Ins. Co. 3 Johns. 352; Fontaine *v.* Col. Ins. Co. 9 Johns. 29; Walden *v.* Chamberlain, 3 Wash. C. C. 290; The Brig Hunter, Ware, 249; The Packet, 3 Mason, 255; The Gratitudine, 3 Rob. 240; The Hannah, Bee, 348.

[2] Hurry *v.* Hurry, 2 Wash. C. C. 145; The Schooner Tribune, 3 Sumner, 144; Ward *v.* Green, 6 Cowen, 173. In Hurry *v.* Hurry, it was held, that the master has a general authority to charter a vessel in a foreign port, if the owner has no agent there. But this must be taken with the limitation that chartering the vessel would be consistent with her usual course of employment.

[3] The Aurora, 1 Wheat. 102; The Ship Fortitude, 3 Sumner, 228, 236; Milward *v.* Hallett, 2 Caines, 77; Rocher *v.* Busher, 1 Stark. 27; James *v.* Bixby, 11 Mass. 37.

[4] See *ante*, note 1, as to how necessary the supplies must be. If necessary, the master may borrow money for supplies, repairs, or for any other purpose connected with the navigation of the ship. In Beldon *v.* Campbell, 6 Exch. 886; 6 Eng. L. & Eq. 473, *Parke*, B., said: "In this case the point reserved for the consideration of the court was, whether the owner of a vessel who resided at Newport, was liable to the plaintiff, a merchant at Newcastle, (which is within one day's post of Newport,) for a sum of money which had been borrowed by the master of the defendant's ship at Newcastle,

So the master, — unlike other agents, who have generally no power of delegation, — may substitute another for himself, to discharge all his duties, and possess all his authority, if he is unable to discharge his own duties, and therefore the safety of the ship and property calls for this substitution.[1]

Generally, the master has nothing to do with the cargo between the lading and the delivery. But, if the necessity arises, he may sell the cargo, or a part of it, at an intermediate port, if

for the purpose of paying a debt contracted for towing a vessel by steam-tug into port, and also for a sum paid on Saturday to a master carpenter, who had been employed to repair the vessel. We are of opinion that a nonsuit must be entered. There is no doubt of the power of the master by law (but some as to what extent it goes) to bind the owner. The master is appointed for the purpose of conducting the navigation of the ship to a favorable termination, and he has, as incident to that employment, a right to bind the owner for all that is necessary, — that is upon the legal maxim — *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.* Consequently the master has perfect authority to bind his principal, the owner, as to all repairs, necessary for the purpose of bringing the ship to her port of destination; and he has also power, as incidental to his appointment, to borrow money, but only in cases where ready money is necessary, — that is to say, when certain payments must be made in the course of the voyage, and for which ready money is required. An instance of this is the payment of port dues, which are required to be paid in cash, or lights, or any dues which require immediate cash payments. So also in the case referred to in the course of the argument, where, a ship being at the termination of one voyage, and about to proceed on another, money borrowed to pay the wages of seamen, who would not go on the second voyage without being paid, was considered necessary. Robinson *v.* Lyall, 7 Price, 592. But these instances do not apply when the owner of the vessel is so near the spot as to be conveniently communicated with. In that case, before the master has any right to make the owner a debtor to a third person, he must consult him, and see whether he is willing to be made a debtor, or whether he will refuse to pay the money. It appears to us that there are two objections to the plaintiff's recovering either the one sum or the other. With respect to the money borrowed for the purpose of paying the steam-tug, it appears that the vessel was off the port of Newcastle, which was its ultimate port of destination, at the time when the assistance of the steam-tug was necessary in order to tow the vessel into the river Tyne, and the owner of the steam-tug did not object to tow the vessel without previous payment. If the owner of the steam-tug had said, "I will not tow you in unless you will actually pay the money down," then it would have been necessary for the master to have borrowed the money for that purpose. It could not be expected that he would wait at the mouth of the harbor, where it would have been impossible for him to have communicated with the owner at Newport, a great distance off, in order to ascertain whether he should borrow the money or not. In this case, however, the owner of the steam-tug did not make any such stipulation; but the vessel was towed into Newcastle, and the money was not paid until after several days had elapsed, during which it was perfectly competent for the master to have written to Newport, (which was only a day's post, as it happened) and got an answer from the owner of the vessel. Instead of that, he goes, four or five days afterwards, and borrows money from the plaintiff, for the purpose of paying this debt to the owner of the steam-tug, — a debt for which the owner of the vessel was liable, because it was within the province of the master to employ the steam-vessel. We think that under these circumstances, that the master had no power to borrow money in order to pay a debt for which the owner of the vessel was already responsible by the original contract, and still less to borrow that money without consulting the owner." It was held in Arthur *v.* Barton, 6 M. & W. 138, and in Johns *v.* Simons, 2 Q. B. 425, that, if a master cannot communicate with the owner without great delay, he may borrow, although in a home port. See also Selden *v.* Hendrickson, 1 Brock. 396.

[1] 1 Bell's Comm. 413. See also The Alexander, 1 Dods. Adm. 278, where a new master was appointed by the consignees.

he cannot carry it on or transmit it, and it must perish before he can receive specific orders.[1] So, he may sell it, or a part, or pledge (or hypothecate) it, by means of a *respondentia* bond, in order to raise money for the common benefit.[2] A bond of respondentia is much the same thing as to the cargo, that a bottomry bond is as to the ship. Money is borrowed by it, at maritime interest, on maritime risk, the debt to be discharged by a loss of the goods.[3] But it can be made by the master only on even a stronger necessity than that required for bottomry; only when he can raise no money by bills on the owner, nor by a bottomry of the ship, nor by any other use of the property, or credit of the owner.[4]

[1] Bryant *v.* Commonwealth Ins. Co. 13 Pick. 543; Freeman *v.* East Ind. Co. 5 B. & Ald. 619; Morris *v.* Robinson, 3 B. & C. 196; Cannan *v.* Meaburn, 1 Bingh. 243; Smith *v.* Martin, 6 Binn. 262; Pope *v.* Nickerson, 3 Story, 465; Jordan *v.* Warren Ins. Co. 1 Story, 342; Saltus *v.* Ocean Ins. Co. 12 Johns. 107; The Ship Packet, 3 Mason, 255; Dodge *v.* Union Mar. Ins. Co. 17 Mass. 471. In Bryant *v.* Commonwealth Ins. Co. 13 Pick. 543, 553, *Putnam*, J., said: "In American Ins. Co. *v.* Center, 4 Wend. 52, (Cases in Error,) 'the master is not authorized to sell the ship or cargo, except in a case of absolute necessity, when he is not in a situation to consult with the owner, and when the preservation of the property makes it necessary for him to act as agent for whom it may concern.'" Per the Chancellor. Abbott on Ship. (4th Amer. ed.) 241: "The disposal of the cargo by the master, is a matter that requires the utmost caution on his part. He should always bear in mind that it is his duty to convey it to the place of destination, by every reasonable and practicable method." Id. 243: "Transshipment for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original purpose." . . . "The merchant should be consulted, if possible. A sale is the last thing that the master should think of, because it can only be justified by that necessity which supersedes all human laws. If he sell without necessity, the persons who buy, under such circumstances, will not acquire a title as against the merchant, but must answer to him for the value of the goods." The learned editor remarks, in note 1: "When a ship is driven out of her course by stress of weather, the charge of the cargo devolves on the master, whose duty it is to take care of it. In such case, he has power to sell goods which are perishable or damaged. But he has no right to sell goods, which are in good condition and not perishable, without the orders of the owners, to whom he is bound to give immediate information." See *ante*, p. 376, n. 3, on sale of ship by the master.

[2] The Gratitudine, 3 Rob. 240; Pope *v.* Nickerson, 3 Story, 465; The Packet, 3 Mason, 255; The United Ins. Co. *v.* Scott, 1 Johns. 106; Fontaine *v.* Col. Ins. Co. 9 Johns. 29; Searle *v.* Scovell, 4 Johns. Ch. 222; Amer. Ins. Co. *v.* Coster, 3 Paige, 323; Ross *v.* Ship Active, 2 Wash. C. C. 226. It seems that, when goods are sold by the master, to repair the vessel, it is to be considered as in the nature of a forced loan, for which the owner of the vessel is liable to the shipper, whether the vessel arrive or not. Pope *v.* Nickerson, 3 Story, 465.

[3] See *ante*, cases on bottomry bonds. But in Franklin Ins. Co. *v.* Lord, 4 Mason, 248, the respondentia bond was for $10,000, and it contained a clause that the vessel was to have goods to that amount on board. The vessel was lost, with only $9,000 worth of goods on board. Held, that the lenders could recover the difference between the amount lent and the amount on board.

[4] The Gratitudine, 3 Rob. 240; Ross *v.* The Ship Active, 2 Wash. C. C. 226; The Packet, 3 Mason, 255; Hussey *v.* Christie, 13 Ves. 599; U. S. Ins. Co. *v.* Scott, 1 Johns. 106. In the case of The Gratitudine, this right of the master, in a case of necessity, to give a respondentia bond, was thoroughly considered, in the light both of principle and authority, and the right was firmly established.

The general remark may be made, that a master has no ordinary power, and can hardly derive any extraordinary power even from any necessity, except for those things which are fairly within the scope of his business as master, and during his employment as master. Beyond this, he has no agency or authority that is not expressly given him.[1]

The master has a lien on the freight for his disbursements and charges for the owner.[2] The extent of this lien is not quite certain on the authorities. But in this country, we think, it secures the whole amount due to him, for wages, primage, or disbursements.[3] And that he may hold the cargo even from the consignor or shipper, until his lien is discharged.

The owner is liable also for the wrong doings of the master.[4] But, we think, with the limitation which belongs generally to the liability of a principal for the torts of his agent, or of a master for the torts of his servant. That is, he is liable for any injury done by the master, while acting *as master*. But not for the wrongful acts which he may do personally, when he is not acting in his capacity of master, although he holds the office at the time. Thus, if, through want of skill or care, while navigating the ship, he runs another down, the owner is liable for the collis-

[1] The master cannot settle claims against a vessel, which do not accrue while he is master. Kelley *v.* Merrill, 14 Maine, 228. Or purchase a cargo, unless he has received some authority beyond that implied by his appointment as master. Hewett *v.* Buck, 17 Maine, 153; Lyman *v.* Redman, 23 Maine, 289. But, if so appointed, he may be the agent of the owners, both to buy and sell cargoes. Peters *v.* Ballistier, 3 Pick. 495. See also Mervin *v.* Shailer, 16 Conn. 489.

[2] Ingersoll *v.* Bokkelin, 7 Cow. 670, S. C. 5 Wend. 315; The Ship Packet, 3 Mason, 255; Richardson *v.* Whiting, 18 Pick. 530; Lewis *v.* Hancock, 11 Mass. 72; The Brig Spartan, Ware, 149; Shaw *v.* Gookin, 7 N. H. 19; The Ship New Jersey, Pet. Adm. 223; The Sloop Rainbow, Bee's Adm. 116. In England, it is now held that the master has no lien on the freight for necessary disbursements. Smith *v.* Plummer, 1 B. & Ald. 575. But see White *v.* Baring, 4 Esp. 22, and Hussey *v.* Christie, 9 East, 426. Whether the master has a lien on the ship as well as on the freight, is not quite settled. It was favored in The Ship Packet, 3 Mason, 225, per *Story*, J.; in The Ship New Jersey, 1 Pet. Adm. 227; The Sloop Rainbow, Bee's Adm. 116.

[3] In The Brig Spartan, Ware, 149, it was held that the master had a lien on the ship for his wages, as well as for necessary disbursements. And in Richardson *v.* Whiting, 18 Pick. 530, *Putnam*, J., said, that the able judge of the United States Court of that district of Massachusetts, had extended the lien on freight to the wages of the master. But in the case of The Grand Turk, 1 Paine, C. C. 73, and in Fisher *v.* Willing, 8 Serg. & R. 118, it was held that the master had no lien on the ship for his wages. And in Ingersoll *v.* Van Bokkelin, 7 Cow. 670, it was held that he had no lien whatever for his wages, his contract to serve as master giving only a claim upon the owner personally.

[4] Dusar *v.* Margatroyd, 1 Wash. C. C. 13; Stone *v.* Ketland, 1 Wash. C. C. 142; Bussy *v.* Donaldson, 4 Dall. 206; Manro *v.* Almeida, 10 Wheat. 473; Dean *v.* Angus, Bee's Adm. 369; The Karasan, 5 Rob. 291; Nostra Signora de los Dolores, 1 Dobson, 290; The Mary, 1 Mason, 365.

ion.[1] But not, if the master, when on shore, or even on his own deck, quarrels with a man, and beats him.[2] Nor is the owner liable if the master embezzles goods which he takes on board to fill his own privilege, he to have all the freight and profit.[3] Nor for injury to, or embezzlement of, goods put clandestinely on board, when the owner is on board and attending to the lading of the ship, and the shipper of the goods knows this, or has notice enough to put him on his guard.[4]

[1] The Thames, 5 Rob. 345; The Woodrop Sims, 2 Dodson, 83.

[2] The Druid, 1 W. Rob. 391, 6 Jurist, 144; The Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill, 480, S. C. 2 Comst. 479; The Dias *v.* The Privateer Revenge, 3 Wash. C. C. 262; Ralston *v.* The States Rights, Crabbe, 22; 1 Parsons on Cont. 87, and note. In the case of The Druid, a Danish vessel was passing out of the port of Liverpool, when she was wilfully injured by the master of a steam-tug, who towed her about in a violent manner, and carried her out of her course, in consequence of which she received considerable damage. It was held that the owners of the steam-tug were not liable. But Dr. *Lushington*, in so deciding, commented forcibly upon the hardship of the rule which exonerates the owners in such cases, saying: "The general principle of law, that the master is liable for the acts done by his servants in the scope of their employment, is not denied, but it is contended, on behalf of the owners of The Druid, that the principle does not apply to this case, and that no such liability exists where the servant, though occupied in the affairs of his master generally, has occasioned an injury by his violent, wilful, and malicious conduct. The justness of the reasoning upon which this distinction is founded, is, I must confess, not altogether apparent to my mind; and if I had been called upon to decide this question upon my own judgment alone, in the absence of any decided cases, I might, perhaps, have felt some difficulty in arriving at the conclusion to which I am about to come in the present instance. It is consistent with reason and natural justice, that a master should be responsible for the skill and honesty of the agent whom he employs in the management of his business. He selects him, and holds him out to the world as a fit person to be trusted; and in so doing, to a certain extent, he may be said to contract with the person with whom he deals for the existence of these qualities in his agent. Unless, therefore, the principal was responsible, mankind would have no security or protection in the ordinary transaction of their affairs." But, notwithstanding his objections to the rule, he felt bound, by the decided cases, to abide by it.

[3] King *v.* Lenox, 19 Johns. 235; Boucher *v.* Lamson, Cas. Temp. Hardwicke, 85. See following note.

[4] Walter *v.* Brewer, 11 Mass. 99; Reynolds *v.* Toppan, 15 Mass. 370; Ward *v.* Green, 6 Cowen, 173. The cases cited in this note and the preceding, were decided on the ground that the master was not authorized to contract to carry the goods which were lost, and hence, that the owner was not liable for the breach of the contract. In Walter *v.* Brewer, the owner was with his vessel at Monte Video, for the purpose of taking a cargo for himself, and not intending to take freight for others. The master, without the knowledge of the owner, took on board a few bales of Neutra skins, to carry to Boston. It was in evidence that the bales would not more than fill the 'privilege,' which the masters of vessels, in a case like that, were accustomed to have. The judge, at Nisi Prius, instructed the jury, "That, although the owners of ships were generally liable for the contracts of their masters abroad, touching the ship on the voyage, yet, as the owner, in this instance, had himself gone in the ship, for the purpose of procuring a cargo, and as the ship was not put up for freight, and as the defendant was not consulted respecting this shipment, nor the persons who attended to his business in his absence, but they were taken on board without his knowledge, he was not accountable originally for the safe transportation and delivery of the goods; but if the jury believed that the defendant knew, before his ship sailed from Monte Video, that these bales had been taken on board by the master, he must be considered as having adopted the act of the master, and as having consented thereto, and so would be accountable." These instructions were held to be correct, with the exception that it was not sufficient to

The general rule in this country, in respect to collision, should perhaps be stated here. It is, that, if both parties be equally in fault, the loss is apportioned;[1] if neither party be in fault, the loss rests where it falls.[2] But if the fault be wholly, or substantially, on the one side, the other can recover full compensation.[3] There are certain rules in regard to sailing; as, that the ship that has a fair or leading wind shall give way to one on a wind, or go under her stern, and that steamers shall give way to sailing

charge the owner that he knew that the goods were taken on board, but that he must have "knowledge that the goods were received on board upon freight."

[1] The Woodrop Sims, 2 Dodson, 83; Hay *v.* Le Neve, 2 Shaw, Scotch App. Cas. 365; The Scioto, Daveis, 359; Lenox *v.* Winisimmet Co. 1 Law Rep. (N. S.) 80; Rogers *v.* The Rival, 9 Law Rep. 28. In Ralston *v.* State Rights, Crabbe, 22, it was held that the rule, that, where both parties are in fault, the damages must be shared, applies only to cases where both parties are in fault in the acts which produced the collision, and where the faults are not egregiously unequal. In Rogers *v.* The Rival, the costs were thrown upon the party more in fault, although the loss was divided. In the courts of common law, if both parties are in fault, the loss rests where it falls. Vennall *v.* Garner, 1 Crompt. & Mees. 21; Rathbun *v.* Payne, 19 Wend. 399; Barnes *v.* Cole, 21 Wend. 188; Simpson *v.* Hand, 6 Whart. 311; Kelly *v.* Cunningham, 1 Cal. 365. But if there were gross negligence on one side, the other party might recover, notwithstanding slight negligence on his part. Rathbun *v.* Payne, 19 Wend. 399; Innis *v.* The Steamer Senator, 1 Cal. 459. See 1 Parsons on Cont. 702, where numerous cases upon this point are cited.

[2] Stainback *v.* Rae, 14 How. 532; The Woodrop Sims, 2 Dodson, 83; The Shannon, 1 W. Rob. 463. In Stainback *v.* Rae, Mr. Justice *Nelson* said: "We are of opinion, therefore, that the collision was the result of an inevitable accident, arising out of one of the perils of navigation, and, in judgment of law, is not attributable to the fault of either party. And in such cases, the settled rule in admiralty in England is, that each vessel must bear its own loss, which rule has been heretofore recognized by this court, but has not been directly applied." The Woodrop Sims, 2 Dodson's Adm. R. 83; Smith *v.* Condry, 1 How. 28; Strout *v.* Foster, id. 89; 3 Kent's Com. 231; Abbott on Shipping, pt. 3, c. 1, and pt. 4, c. 10, § 10; 2 Brown's Civ. and Adm. Law, 204–207; 5 How. 503; and other cases. The rule is not uniform upon the continent, as several of the maritime States, in such cases, apportion the loss between the two vessels. Abbott, 224, 230; 2 Brown's Civ. and Adm. Law, 204–206; 3 Kent's Com. 230, 231, 232. But we think it more just and equitable, and more consistent with sound principles, that, where the loss happens from a collision which is the result of inevitable accident, without the negligence or fault of either party, each should bear his own. There seems no good reason for charging one of the vessels with a share of a loss resulting from a common calamity, beyond that happening to herself, when she is without fault, and therefore in no just sense responsible for it."

[3] In the Woodrop Sims, 2 Dodson, 83, a case of collision, Sir *W. Scott* said: "There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as, where the loss is occasioned by a storm, or any other *vis major*. In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise when both parties are to blame; when there has been a want of due diligence, or of skill, on both sides. In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case, the injured party would be entitled to an entire compensation from the other."

ships;[1] and that vessels in tide ways, or otherwise in danger of collision, should hang out lights,[2]— these should all be observed,

[1] In St. John *v.* Paine, 10 How. 557, 581, Mr. Justice *Nelson* laid down the rules as follows: "A vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. So, when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which is to the windward. But if the vessel on the larboard tack is so far to windward that, if both persist on their course, the other will strike her on the lee side, abaft the beam, or near the stern, in that case, the vessel on the starboard tack should give way, as she can do so with greater facility, and less loss of time and distance, than the other. Again, when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere on her course, while that on the larboard tack should bear up, or keep away before the wind." The Friends, 1 W. Rob. 483; The Traveller, 2 W. Rob. 197; The Ann and Mary, id. 189; The Chester, 3 Hagg. 316; The Jupiter, id. 320; The Celt, id. 327; The Woodrop Sims, 2 Dodson, 86; The Thames, 5 Rob. 345; 3 Carr. & Payne, 528; 9 id. 601; 12 Moore, 148; 3 Kent's Comm. 230. . . "Steam-vessels are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel, going free or with a fair wind, would be required to do under similar circumstances. Their obligation extends still further, because they possess a power to avoid the collision, not belonging to sailing vessels, even with a free wind, the master having the steamer under his command, both by altering the helm and by stopping the engines. . . . As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her." The Osprey, 17 Law Rep. (7 N. S.) 384; The Leopard, Daveis, 193; The Northern Indiana, 16 Law Rep. (6 N. S.) 433; Newton *v.* Stebbings, 10 How. 586. The English rules appear to have differed from the above in that a sailing vessel, with a free wind, was put upon the same footing with a steamer, and that, in case two sailing vessels have the wind free, both must put their helms to port; while under the rules laid down above, a steamer has the duty of avoiding a sailing vessel in all cases, although the latter have the wind free, and if two sailing vessels have the wind free, the one on the larboard tack must give way to the other. The Gazelle, 2 W. Rob. 517; The City of London, 4 Notes of Cas. 40, 5 Eng. Adm. Rep.; The George, 5 Notes of Cases, 368; The Birkenhead, 3 W. Rob. 75. But the Merchant Shipping Act of 17 & 18 Vict. contains regulations which modify in some respect these rules. See 8 Law Rep. N. S. 181, where this subject is considered.

[2] The Iron Duke, 2 W. Rob. 377; The Rose, 2 W. Rob. 4; The Scioto, Daveis, 359; Lenox *v.* Winisimmet Co. 1 Law Rep. N. S. 80; Carsley *v.* White, 21 Pick. 254; Simpson *v.* Hart, 6 Whart. 324; Bark Delaware *v.* Steamer Osprey, 2 Wallace, Jr. 268; Kelly *v.* Cunningham, 1 Cal. 365; Innis *v.* The Steamer Senator, 1 Cal. 459. In Carsley *v.* White, *Morton*, J., in delivering the opinion of the court, said: "We know of no positive rule or usage requiring the master, always, in the night time, to keep a light exhibited on his vessel, and operating like the rule in the laws of Oleron or of Wisbuy, which made it the duty of the master, always, when in port, to keep a buoy to his anchor, and rendered him liable for all damage caused by his neglect to do it." Laws of Oleron, art. 14; Laws of Wisbuy, art. 28, 51. See 1 Peter's Adm. Appendix, 28, 78, 85. "Whether common prudence required of the plaintiffs to have a light, and the omission to have it amounted to negligence, must depend upon the darkness of the night, the number and the situation of the vessels in the harbor, and all the other circumstances connected with the transaction. This is a question of fact, within the province of the jury." In The Scioto, *Ware*, J., after an examination of the authorities, said: "On these authorities, as well as the obvious reason of the thing, I feel justified in stating that a vessel, lying in the channel of this port, (Portland, Maine,) (and by the channel I mean that part of the water which is traversed by vessels coming into the harbor, whether they can lay their course in, or are under the necessity of beating in,) is bound to show a light in the night-time, whether the night is obscured by clouds, or it is starlight, provided there be no moon."

and neglect of them would go far to imply want of care or skill. But none of these rules are positive, and binding with the force of law.

For any misdeed of the master, for which the owner is liable, this liability is limited in our own country as well as in many others, and also in one or two of our own States, to the value of the ship and freight.[1]

SECTION X.

OF THE SEAMEN.

The law makes no important distinction between the officers, or mates, as they are usually called, and the common sailors.[2] Our statutes contain many provisions in behalf of the seamen, and in regulation of their rights and duties, although the contract between them and the ship-owner is in general one of hiring and service.[3] Our statutory provisions relate principally to the

[1] Rev. Stats. of Mass. c. 32, § 1; Rev. Stats. of Maine, c. 47, § 8. Few questions appear to have been brought before the courts under these statutes. See Pope *v.* Nickerson, 3 Story, 465; Stinson *v.* Wyman, Daveis, 172. In the latter case, it was intimated that, in case of loss from the negligence of the master, the owner may relieve himself from responsibility by abandoning the vessel. This would seem to be doubtful. See, also, the act of Congress of March 3, 1851, which limits the liability of ship-owners, and the case of Wattson *v.* Marks, 2 Am. Law Register, 157.

[2] See Grant *v.* Baily, 12 Mod. 440; S. C. Viner's Ab. tit. Mariners, B. 2, where it is said of the mate: "The court inclined to consider him as a mariner, because he is hired by the master, as other mariners; but the master is put in by the owners." See, also, the case of The Exeter, 2 Rob. Ad. 261, where Lord *Stowell* laid it down that officers come before the courts of admiralty with as strong a title to indulgence and favorable attention as common mariners. It was said, likewise, by C. J. *Rider*, in Mills *v.* Long, 1 Sayer, 136, and repeated by Sir J. *Nicholl*, in The Prince George, 3 Hagg. 379, that the privilege of suing for wages in admiralty, extends "to every person employed on board ship except the master." Thus it has been held that the purser has that privilege. The Prince George, *supra*. And so with the surgeon. Mills *v.* Long, *supra;* The New Jersey, 1 Pets. Ad. 230, 233; Trainer *v.* Superior, Gilp. 514; Packard *v.* Louisa, 2 Wood. & Min. 53; The Carpenter; The Lord Hobart, 2 Dods. 104. The Boatswain; Ragg *v.* King, 2 Stra. 858. The pilot, engineer, and fireman on board a steamboat. Wilson *v.* The Ohio, 1 Gilp. 505; Packard *v.* Louisa, *supra*. And a woman who acted as cook and steward, and as a mariner. The Jane and Matilda, 1 Hagg. 187. But not musicians on board a vessel, who are hired and employed merely as such. Trainer *v.* The Superior, *supra*.

[3] Wilkinson *v.* Frazier, 4 Espin. 182; Pitman *v.* Hooper, 3 Sumn. 59; Farral *v.* McClea, 1 Dall. 393; Bishop *v.* Shepherd, 23 Pick. 495; Smith *v.* Leard, Hopkins, 199. The personal liability of the master to the seamen for wages being founded on contract, if he did not make the original contract, but merely succeeded to the place of master in the course of the voyage, by reason of the death or removal of the former master, he is not liable for the wages antecedently earned, but only for those earned while he is master. Wysham *v.* Rossen, 11 Johns. 72; Mayo *v.* Harding, 6 Mass. 300. The contract is still considered a contract to hire, and not a contract of partner-

following points: 1st, the shipping articles; 2d, wages; 3d, provisions and subsistence; 4th, the sea-worthiness of the ship; 5th, the care of seamen in sickness; 6th, the bringing them home from abroad; 7th, regulation of punishment.

First. Every master of a vessel is bound to have shipping articles, which articles every seaman on board must sign, and they must describe accurately the voyage, and the terms on which each seaman ships.[1] Courts will protect seamen against indefinite or

ship in the fisheries, where, by a usage of the trade, the crew generally ship for a specific share of the oil or fish, in lieu of wages. Baxter *v.* Rodman, 3 Pick. 435; Grozier *v.* Atwood, 4 ib. 234; Bishop *v.* Shepherd, *supra;* Wilkinson *v.* Frazier, *supra;* Dry *v.* Boswell, 1 Camp. 329; Pott *v.* Eyton, 3 C. B. 32.

[1] Act, 1790, c. 56, (29,) 1 U. S. Stats. 131; Magee *v.* Moss, Gilpin, 229; Wood *v.* The Nimrod, id. 83; Douglass *v.* Eyre, id. 147, 219; Brown *v.* Jones, 2 Gallis. 477; Countess of Harcourt, 1 Hagg. 248; The Eliza, id. 185; The Minerva, id. 354; The George Home, id. 374. In this last case it was decided that under an engagement to go "from London to Batavia in the East India seas, or elsewhere, and until the final arrival at any port or ports in Europe," the seamen were not bound, upon the arrival of the vessel at Cowes for orders, according to previous agreement between the owners and the master, to proceed on a further voyage to Rotterdam; Lord *Stowell* remarking: "It is a dry question upon the sufficiency of the description of the voyage. . . . . The mariner's contract describes the voyage for which they undertake, 'to be from the port of London to Batavia, to any ports and places, the East India seas or elsewhere, and until her final arrival at any port or ports in Europe.' This is certainly a most sweeping description of the ports of unlivery, for it comprehends every port situated between the southern and northern extremities of Europe. It would apply with equal truth to Corfu and Archangel; it could not in either case be charged as a misrepresentation. But though a true description in that sense, and, therefore, not liable to a charge of absolute deception, yet it by no means answers the beneficial purposes for which the law makes the demand in favor of the mariner. The beneficial purposes for which the law makes such a requisition in his favor are, that he may know as exactly as can be described, for what probable space of time he surrenders himself, his services, his interest, his domestic comforts, his health and personal convenience. These and other considerations are to influence his decision. With respect to the disposal of himself, he has a right to be informed as far as competent accuracy can be applied to the subject; and it is unnecessary to add, that a description which extends over one entire quarter of the globe, without any more particular limitation, though geographically true, affords nothing that can be considered as bearing the shape or color of such accuracy. It may be truly and justly said, that cases may occur in which the exigencies of commerce may not admit of such accuracy. . . . . But though, possibly in many cases not attainable, yet in most cases, and among others, in the present case, a much nearer approach might be made towards certainty, than is made in the instance of the present description. I take it that by the preconcerted arrangement, the vessel was to come up to Cowes, in the British Channel, and there to receive orders from the English owners in London at what port the cargo was to be deposited. The proper description of the voyage ought, therefore, in the mariners' contract, to have been stated for the ship to come to Cowes, and there to receive the owner's order for the delivery of the cargo in England, Holland, or even in the ports of the North Sea, if there was any such latter destination intended. The mariner, upon such a description, would have received full and true information of all which it imported him to know, in order to determine his mind upon the propriety of his engagement in the contract; it would be a true description, not merely geographically, for the fact of the voyage, but for a proper conformity to the purposes of the statute. . . . I am far from proposing the mode I have suggested as an universal specific for all possible cases. But the general principle must be that precision must be given as far as practicable." As to the use of the words "elsewhere," in the description of the voyage in the shipping articles, see the English cases before cited; also, 1 Hall, Am. Law

catching language, and against unusual and oppressive stipulations.[1] If a number of ports are mentioned, they are to be visited only in their geographical and commercial order, and not revisited unless the articles give the master a discretion.[2] Admiralty courts enforce or disregard the stipulations, as they are fair and legal, or otherwise, and exercise a liberal equity on this subject;[3]

Journ. 209, and Brown *v.* Jones, 2 Gallis. 477. A description in shipping articles, of a voyage from New London to Oporto and elsewhere, was held to mean a voyage from New London to Oporto; and the words "and elsewhere" were rejected for uncertainty. Ely *v.* Peck, 7 Conn. 239. As to the meaning of the word "cruise," in the shipping articles, see The Brutus, 2 Gallis. 526. A trading voyage does not include a freighting voyage. Brown *v.* Jones, 2 Gallis. 477.

[1] Leading cases on this subject are The Juliana, 2 Dods. 504; Harden *v.* Gordon, 2 Mason, 541; Brown *v.* Lull, 2 Sumn. 443. In Harden *v.* Gordon, *Story*, J., said: "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected, and need counsel; because they are thoughtless, and require indulgence; because they are credulous and complying, and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar protecting favor and guardianship. They are emphatically the wards of the admiralty. If there is any undue equality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is, that the bargain is unjust and unreasonable; that advantage has been taken of the situation of the weaker party, and that, *pro tanto*, the bargain ought to be set aside as inequitable. Hence, every deviation from the terms of the common shipping paper, which stands upon the general doctrines of maritime law, is rigidly inspected; and if additional burdens or sacrifices are imposed upon the seamen without adequate remuneration, the court feels itself authorized to interfere, and moderate or annul the stipulation." Accordingly, in this case, a stipulation that the seamen should pay for medical aid and medicines further than the ship afforded, no extraordinary compensation being allowed therefor, was set aside as grossly inequitable. As to clauses affecting the rights of the seamen to their wages, see Johnson *v.* The Lady Walterstorff, 1 Pets. Ad. 215; Id. 186, n; Swift *v.* Clark, 15 Mass. 173; Brown *v.* Lull, *supra;* The Juliana, *supra;* The Hoghton, 3 Hagg. 100; Rice *v.* Hayllet, 3 Car. & Payne, 534, where a crew were shipped on a voyage "to a port or ports easterly of the Cape of Good Hope, or any other port or ports to which the master should see fit to go, in order to procure a cargo," but the owners really intended that the vessel should proceed to Ichaboe, there to ship guano, which destination was concealed from the crew, the court held that the seamen were not bound to load the guano for the wages fixed in the shipping articles. Smith *v.* The Brooklyne, 8 Law Rep. 70. Where any doubt arises upon the construction of the shipping articles, the court will give the benefit of it to the seamen. The Minerva, 1 Hagg. 355; The Hoghton, 3 Hagg. 112; Jansen *v.* Heinrich, Crabbe, 226.

[2] Douglass *v.* Eyre, 1 Gilp. 147. In this case it was held that shipping articles for a voyage "from Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia, authorize a voyage directly from Gibraltar to South America, without proceeding to any intermediate European port, but not a return afterwards from South America to a European port. See, also, Magee *v.* Ship Moss, 1 Gilp. 229; Woods *v.* The Nimrod, id. 83; Brown *v.* Jones, 2 Gall. 477.

[3] The Minerva, 1 Hagg. 347; The Prince Frederick, 2 Hagg. 394; Sims *v.* Jackson, 1 Wash. C. C. 414; Natterstrom *v.* The Ship Hazard, Bee's Adm. 441; Harden *v.* Gordon, 2 Mason, 541; Brown *v.* Lull, 2 Sumn. 443. "Courts of Admiralty," said Mr. Justice *Story*, in this last case, p. 449, "are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so; so far as the maintenance of their rights, and the protection of their interests, against the effects of the superior skill and shrewdness of masters and owners of ships are concerned. Courts of admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal principles of courts of equity; and in short so far as their powers extend, they act as courts of equity. Wherever, therefore, any stipulation is found in the ship-

but courts of common law are more strictly bound by the letter of the contract.[1] The articles are generally conclusive as to wages; but accidental errors or omissions may be supplied or corrected by either party, by parol.[2]

Second. Wages are regulated as above stated, and also by limiting the right to demand payment in a foreign port, to one third the amount then due, unless it be otherwise stipulated.[3] Seamen have a lien on the ship and on the freight for their wages, which is enforceable in admiralty.[4] By the ancient rule,

ping articles, which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded upon imposition, or an undue advantage taken of their necessities, and ignorance, and improvidence, unless two things concur, — first, that the nature of the clause is fairly and fully explained to the seamen, and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby."

[1] Cutter *v.* Powell, 6 Term, 320; Appleby *v.* Dods, 8 East, 300; Jesse *v.* Roy, 1 Crompt., Mees. & Rose, 316, 340. See, also, Brown *v.* Lull, *supra*.

[2] Veacock *v.* M'Call, 1 Gilp. 329; Wickham *v.* Blight, ib. 452; Bartlett *v.* Wyman, 14 Johns. 260; The Isabella, 2 Rob. 241; The Providence, 1 Hagg. 391; The Harvey, 2 Hagg. 82; The Prince George, 3 Hagg. 376; Dafter *v.* Cresswell, 7 Dowl. & Ryl. 650. Where the rate of wages is not specified in the shipping articles, the statute of 1790, c. 56, (29) § 1, provides that the seamen shall be entitled to the highest rate of wages paid at the port where he ships, for a similar voyage, within the three months preceding, and parol evidence will not be admitted to show an agreement for a lower rate. The Crusader, Ware, 437.

[3] Act, 1790, ch. 56, (29,) § 6; 1 Pets. Adm. 186, n.; Johnson *v.* The Walterstorff, 1 Pets. Adm. 215.

[4] Sheppard *v.* Taylor, 5 Pets. Sup. Ct. 675; The Mary, Paine, C. Ct. 180; The Brig Spartan, Ware, 134; Lewis *v.* The Elizabeth & Jane, ib. 44; Skolefield *v.* Potter, Daveis, 392; Smith *v.* The Stewart, Crabbe, 218; Taylor *v.* The Royal Saxon, 1 Wallace, Jr. 311; The Sidney Cove, 2 Dods. 13; The Neptune, 1 Hagg. 227, 239; The Juliana, 2 Dods. 504; The Golubchick, 1 W. Rob. 143. And every part of the freight is liable for the whole of the wages. Skolefield *v.* Potter, *supra*. The lien attaches on money paid by a foreign government as indemnity for a wrongful seizure of the vessel, and consequent loss of freight, and may be enforced by a libel against such proceeds in the hands of assignees having notice of the claim. Sheppard *v.* Taylor, *supra*. See, also, Brown *v.* Lull, 2 Sumn. 443; Pitman *v.* Hooper, 3 Sumn. 50. In Sheppard *v.* Taylor, the lien was said not to extend to the cargo, which was the property of the insolvent owners of the vessel, but it is to be remarked, that freight had been awarded to the assignees as a distinct item, and to this the lien was allowed to attach. Understood with reference to these circumstances, the doctrine of the court in this case does not appear inconsistent with the case of "The Spartan," *supra*, where *Ware*, J., held, that where a ship carries the goods of her owners, the seamen have a lien on the cargo for their wages, for a charge in the nature of freight. See, also, Skolefield *v.* Potter, *supra*, p. 402; and the case of The Lady Durham, 3 Hagg. 198, where the court say: "A mariner has no lien on the cargo as cargo. His lien is upon the ship, and upon the freight as appurtenant to the ship; and so far as the cargo is subject to freight, he may attach it as a security for the freight that may be due." See, also, The Riby Grove, 2 W. Rob. 59. Where a voyage is illegal, the seamen's wages are no lien on the vessel. Brig Langdon, Cheves, 2 Mason, 58; The Vanguard, 6 Rob. 207; The Malta, 2 Hagg. 163. It is different where the infraction is of the laws of a foreign power, and is consummated without the assent of the crew. Sheppard *v.* Taylor, *supra*. The wages are due at the end of the voyage, but are not payable till the expiration of the period allowed by law for discharging the vessel and collecting the freight. Hastings *v.* The Happy Return, 1 Pets. Ad. 213. And in the absence of a custom to the contrary, the seamen are bound to assist in unloading the vessel. — Same case. Accordingly, where due diligence had been used, but the ship could not be unloaded within the ten days

that freight is the mother of wages, any accident or misfortune which makes it impossible for the ship to earn its freight, destroys the claim of the sailors for wages.[1]

allowed by the statute, more than fifteen days were allowed by the court for that purpose. Thompson *v.* The Philadelphia, 1 Pets. Ad. 210. See, also, Edwards *v.* The Ship Susan, 1 Pets. Ad. 165. But the mariners may file their libel for wages within the statutory interval, although no process can issue against the vessel. The Mary, Ware, 454. The lien for wages has precedence over bottomry bonds. The Madonna d'Idra, 1 Dods. 37; and over all others; Brown *v.* Lull, *supra;* Pitman *v.* Hooper, *supra.*

[1] Anon. 1 Ld. Raym. 639; Ib. 1 Sid. 179; Hernaman *v.* Bawden, 3 Burr, 1844; The Neptune, 1 Hagg. 232; The Malta, 2 Hagg. 162; Opinion of Judge Winchester, 1 Pets. Ad. 186, n.; Giles *v.* The Cynthia, 1 Pets. Ad. 203; Weeks *v.* The Catharina Maria, 2 Pets. Ad. 424; Thompson *v.* Faussat, 1 Pets. C. C. 182; The Saratoga, 2 Gallis. 164, 175; The Two Catherines, 2 Mason, 319; Brown *v.* Lull, 2 Sumn. 443; Pitman *v.* Hooper, 3 Sumn. 50; Adams *v.* The Sophia, 1 Gilp. 77; Brooks *v.* Dorr *et al.*, 2 Mass. 45; per *Sedgwick, J.*; Moore *v.* Jones, 15 Mass. 424; Blanchard *v.* Bucknam, 3 Greenlf. 1; Hoyt *v.* Wildfire, 3 Johns. 518; Murray *v.* Kellogg, 9 Johns. 227; Porter *v.* Andrews, id. 350. It is not sufficient to destroy the mariner's claim to wages, that no freight actually has been earned, if it might have been. Pitman *v.* Hooper, *supra.* Hence, where the non-earning of freight is owing to the act or default of the owner or master of the vessel, the seamen are entitled to their wages. 1 Pets. Ad. 192, in note. Therefore, "if the voyage or freight be lost by the negligence, fraud, or misconduct of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage, in all these cases the mariners are entitled to wages, notwithstanding no freight has been earned." Per *Story*, J., in the case of The Saratoga, *supra;* and see Hindman *v.* Shaw, 2 Pets. Ad. 264; Giles *v.* The Cynthia, *supra;* M'Quirk *v.* The Penelope, 2 Pets. Ad. 276; The Two Catherines, *supra;* Brown *v.* Lull, *supra;* Emerson *v.* Howland, 1 Mason, 45; Hoyt *v.* Wildfire, 3 Johns. 518; Van Beuren *v.* Wilson, 9 Cowen, 158; Blanchard *v.* Bucknam, *supra;* Oxnard *v.* Dean, 10 Mass. 143; The Juliana, 2 Dods. 504; The Malta, *supra;* The Neptune, 1 Hagg. 232; The Lady Durham, 3 Hagg. 202, per Sir J. *Nicholl.* "If freight is earned in the voyage, and for the voyage, whether it is greater or less, and whether it is actually secured by the owner or not, makes no difference in the rights of the seamen." Per *Story*, J., in Pitman *v.* Hooper, 3 Sumn. p. 60. From this intimate connection between the freight and wages, it results that where the voyage is devisable for the earning of freight, it is so for the earning of wages. 1 Pets. Ad. 186, n.; Anon. 1 Ld. Raym. 639, Hence, where a voyage is divided by various ports of delivery, so that the freight is earned, or would have been under the general maritime law, in portions, a proportionate claim for wages attaches at each of those ports. Edwards *v.* Childs, 2 Vern. 727; The Juliana, *supra;* Anon. 1 Pets. Ad. 186, n.; and for this purpose, a port of destination, to which the vessel proceeds in ballast, is a port of delivery. Giles *et al. v.* The Cynthia, *supra.* "And there can be no difference in principle whether the vessel go empty to a destined port for a cargo, or return under disappointment without one." Same case. See also Millet *v.* Stephens, 2 Dane's Ab. c. 57, p. 461; The Two Catherines, *supra;* Blanchard *v.* Bucknam, *supra.* But see Thompson *v.* Faussat, *supra.* In computing what is due in such cases, it is the established rule to consider half the time spent by the vessel in such a port as included in the voyage to it. Pitman *v.* Hooper, *supra.* Therefore, where the ship, after touching at several such ports, meets with a disaster, the seamen are entitled to their wages up to her arrival at the last of these ports, and for half the time she remained there. Giles *v.* The Cynthia, *supra;* Johnson *v.* The Walterstorff, 1 Pets. Ad. 215; Cranmer *v.* Gernon, 2 Pets. Ad. 390; The Two Catherines, *supra;* Bordman *v.* The Elizabeth, 1 Pets. Ad. 130; Galloway *v.* Morris, 3 Yeates, 445; Murray *v.* Kellogg, 9 Johns. 227; Blanchard *v.* Bucknam, *supra;* Thompson *v.* Faussat, 1 Pets. C. C., 182; Hooper *v.* Perley, 11 Mass. 545; Smith *v.* The Stewart, Crabbe, 218; Locke *v.* Swan, 13 Mass. 76; Swift *v.* Clarke, 15 Mass. 173; Moore *v.* Jones, 15 Mass. 424; Brown *v.* Lull, *supra;* Pitman *v.* Hooper, *supra.* But see Bronde *v.* Haven, 1 Gilp. 592. In the case of Brown *v.* Lull, 2 Sumner, 443, it was held, that "the capture of a merchant ship does not itself operate as a dissolution of the contract for mariner's wages, but at most only as a suspension of the contract. If the

Third. Provisions of due quality and quantity must be furnished by the owner, and double wages are given to the seamen,

ship is restored, and performs her voyage, the contract is revived, and the mariner becomes entitled to his wages; that is, to his full wages for the whole voyage, if he has remained on board and done his duty, or if, being taken out, he has been unable, without any fault of his own, to rejoin the ship. If the ship is condemned by a sentence of condemnation, then the contract is dissolved, and the seamen are discharged from any further duty on board; and they lose their wages, unless there is a subsequent restitution of the property, or of its equivalent value, upon an appeal, or by treaty, with an allowance of freight, in which event their claim for wages revives. In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor. If freight is decreed or allowed for the whole voyage, then the mariners are entitled to the full wages for the whole voyage; for the decree for freight in such a case includes an allowance of the full wages, and consequently creates a trust or lien to that extent thereon, for the benefit of the mariners. If the freight decreed or allowed is for a part of the voyage only, the seamen are ordinarily entitled to wages up to the time for which the freight is given, unless, under special circumstances; as, where they have remained by the ship, at the special request of the master, to preserve and protect the property for the benefit of all concerned." See, also, Pitman *v.* Hooper, *supra;* The Saratoga, *supra;* Watson *v.* The Rose, 1 Pets. Ad. 132; Hart *v.* The Little John, 1 Pets. Ad. 115; Howland *v.* The Lavinia, 1 Pets. Ad. 123; Girard *v.* Ware, 1 Pets. C. C. 142. Sheppard *v.* Taylor, 5 Pet. S. C. 675; Vandever *v.* Tilghman, Crabbe, 66; Brooks *v.* Dorr, 2 Mass. 39; Lemon *v.* Walker, 9 Mass. 403; Hooper *v.* Perley, 11 Mass. 545; Spafford *v.* Dodge, 14 Mass. 66. In such cases a deduction will, however, be made, of any wages earned by the seamen whilst separated from the vessel. Singstrom *v.* The Hazard, 2 Pets. Ad. 384; Brooks *v.* Dorr, 2 Mass. 39; Wetmore, *v.* Henshaw, 12 Johns. 324. The same principles apply to the case of an embargo. Marshall *v.* Montgomery, 2 Dall. 170. The doctrine of the English courts appears to be, that the mariner's contract is dissolved by a capture, but that on recapture, the right to wages revests. Beale *v.* Thompson, 4 East, 546; Johnson *v.* Broderick, ib. 566; Pratt *v.* Cuff, cited in Thompson *v.* Rowcroft, ib. 43; Bergstrom *v.* Mills, 3 Esp. 36; Delamainer *v.* Winteringham, 4 Camp. 186; and see the case of The Friends, 4 Rob. 143, where Sir W. Scott refused wages to a seaman who had been removed from a vessel at the time she was captured, so that he could not rejoin her upon a subsequent recapture, and that her owner was obliged to hire another man in his stead, — even for the short interval preceding the capture. In case of The Dawn, Daveis's Rep. 121, *Ware*, J., after an elaborate examination of the subject, held that in cases of shipwreck, "the crew are bound to remain by the vessel and contribute their utmost exertions to save as much as possible from the wreck; that if this is done, they are always entitled to their full wages, if enough is saved for that purpose; but if they abandon the wreck, and refuse to aid in saving it, their wages are forfeited. But that they may not rest satisfied with saving what is merely sufficient to pay their wages, and may be induced to persevere in their exertions so long as the chance of saving any thing remains, the law, from motives of policy, allows them, according to the circumstances and merits of their services, a further reward in the nature of salvage. The wages are to be paid exclusively from the materials of the ship, but the salvage is a general charge upon the whole mass of proverty saved. It is not, however, intended to be said that they can claim as general salvors, that is, as persons who, being under no obligation to the ship, engage in this service as volunteers, or that they are entitled to be rewarded at the same liberal rate. But they are to be allowed a reasonable compensation, *pro opere et labore*, as the rule is laid down in many of the old ordinances, *boni viri arbitrio*. If the disaster happens in a foreign country, it ought to be at least a sum sufficient to pay the expenses of their return home." See, also, the language of the court in Giles *et al. v.* The Cynthia, *supra*. In general, it may be said that if the crew of a shipwrecked vessel do their duty by her, and by their exertions contribute to the saving of any remnants of the wreck, they should be regarded as entitled to a reward; but whether in the nature of wages or of salvage, or both, as held by J. Ware, and to what extent, has been matter of much conflict in the cases, and cannot be considered as decided. See The Cato, 1 Pets. Ad. 48, 58; Clayton *v.* The Harmony, id. 70, 79; Id. 186, n.; Giles *v.* The Cynthia, *supra;* Adams *v.* The Sophia, 1 Gilp. 77; Brackett *v.* The Hercules, 1 Gilp. 184; The Saratoga, 2 Gallis. 164, 183; The Two Catherines, 2 Mason, 319; Hobart *v.* Dro-

when on short allowance, unless the necessity be caused by some peril of the sea, or other accident of the voyage.[1] The master may at any time put them on a fair and proper allowance to prevent waste.[2]

Fourth. As to the sea-worthiness of the vessel, our statutes provide that it may be inquired into at home or abroad by a regular survey, on complaint of the mate and a majority of the seamen.[3]

gan, 10 Pets. 122; Pitman *v.* Hooper, 3 Sumn. 67; Jones *v.* The Wreck of The Massasoit, 7 Law Rep. 522; Frothingham *v.* Prince, 3 Mass. 563; Same case, 2 Dane's Ab. p. 462; Dunnett *v.* Tomhagen, 3 Johns. 154; Bridge *v.* Niagara Ins. Co. 1 Hall, 423; Lang *v.* Holbrook, Crabbe, 179. The Sidney Cove, 2 Dods. 13; The Neptune, 1 Hagg. 227; The Lady Durham, 3 ib. 196; The Reliance, 2 Wm. Rob. 119. Seamen may, however, become salvors, properly speaking, of their own vessel, in some cases. The Two Catherines, *supra;* The Blaireau, 2 Cranch, 240, 269; Hobart *v.* Drogan, *supra;* Williamson *v.* The Brig Alphonso, 1 Curtis, C. Ct. 376; The Neptune, *supra;* The Governor Raffles, 2 Dods. 14; The Two Friends, 1 Rob. 278; The Beaver, 3 ib. 292; The Florence, 16 Jur. 572. But see The Cato, 1 Pets. Ad. 61. Where freight is paid in advance, it has been held that the seamen are entitled to wages in proportion to the amount of the advance, although the ship perish before any freight be earned. Anon, 2 Shower, 291; and see Brown *v.* Lull, *supra.* The English statute, 17 & 18 Vict. c. 104, § 175, 183, gives to seamen, when the master certifies that they have faithfully performed their duty, a right to wages, although no freight be earned.

[1] Act, 1790, ch. 56, (29,) § 9. The Ship Washington, 1 Pets. Ad. 220; Gardner *v.* Ship New Jersey, ib. 223; The Mary, Ware, 454. "But courts have thought that when a vessel happens to be in a port where it is not in the power of the master to obtain provisions of the amount and description directed by the law, other articles may be substituted which are of equivalent value." The Mary, *supra;* The Washington, *supra.* But see the case of Coleman *v.* Brig Harriet, Bee's Ad. Rep. 80, where a master had put to sea with less than the prescribed quantity of bread, owing to his not being able to obtain a larger supply at the port of departure, but with a large excess of beef and water. The voyage was unusually long, the vessel having been dismasted in a gale of wind, without which it was admitted there would have been no failure of bread, supplies of which were obtained from other vessels at sea. Under these circumstances, the court were of opinion that the crew were entitled to extra wages under the statute, but inasmuch as they had been placed on short allowance with reference to the single article of bread, awarded but one third of the amount of the wages contracted for, over and above the common wages. Under the statute, the burden of proof is upon the libellant to show, not merely that he was placed on short allowance, but that the vessel sailed without the stores prescribed by the act. Ferrara *v.* The Talent, Crabbe, 216. Where their rations are stopped, the crew are justified in leaving the vessel, and do not thereby forfeit their wages. The Castilia, 1 Hagg. 59.

[2] The Mary, *supra.* Where this occurs, the navy ration, fixed by Act 1805, c. 91, § 3, has been assumed as the standard by which the allowance in the merchant service ought to be regulated. The Washington, *supra;* Gardner *v.* Ship New Jersey, *supra.*

[3] Act of July 20, 1790, c. 56, (29;) 1 U. S. Stats. 131; Act of July 20, 1840, c. 23. The former of these acts provides that if the mate or first officer under the captain and a majority of the crew of any vessel bound on a voyage to a foreign port, shall, before the vessel has left the land, require the seaworthiness of the vessel to be inquired into, the master shall stop at the nearest port for the purpose of having such inquiry made. On the construction of this act, *Ware,* J., remarked in the case of The William Harris, Ware, 373, that the reason of the law applies as strongly to the case of a vessel departing from a foreign port on her return, as leaving her home port on a foreign voyage. The act contemplates also the case of a vessel which has commenced her voyage. If, however, the crew, instead of availing themselves of their right under the statute, suffer the owner to repair the vessel of his own accord, and he employs an agent who pronounces her sea-worthy, they cannot refuse to proceed on the ground that the repairs are insufficient, it not appearing that they were so. Porter *v.* Andrews, 9 Johns. 350. By the Act of 1840, a mode of proceeding is provided in a foreign port by which to

But this very seldom occurs in practice. If seamen, after being shipped, refuse to proceed upon their voyage, and are complained of and arrested, the court will inquire into the condition of the vessel, and as the complaint of the seamen is justified, in a greater or less degree, will discharge them, or mitigate or reduce their punishment.

Fifth. As to sickness, our statutes require that every ship shall have a proper medicine-chest on board.[1] Moreover, twenty cents

ascertain the condition of the vessel at the time she left home, and certain penalties imposed if it appear she was not then sea-worthy. Independently of this statute, it has been decided that the law implies in the seaman's contract that the ship shall be sea-worthy at the outset of the voyage. Dixon *v.* The Cyrus, 2 Pets. Adm. 411. If no complaint is made, and the ship proceeds to sea, "nothing but inability can excuse the mariner for a refusal of duty, whatever deficiencies may then occur or be discovered." Same case. But see The William Harris, *supra;* and the case of The United States *v.* Ashton, 2 Sumn. 13, where *Story*, J., held that it was a sufficient defence to an endeavor to commit a revolt, that the combination charged was to compel the master to return into port for the unseaworthiness of the vessel, provided the act was *bonâ fide*, and the vessel actually unseaworthy, and so where it was upon reasonable grounds and apparent unseaworthiness, and it was doubtful whether the vessel was unseaworthy or not.

[1] Act of 1790, c. 56, (29,) § 8; 1 U. S. Stats. 134; Act, 1805, c. 88; 2 U. S. Stats. 330. How far these acts affect the general right of the seamen under the maritime law to be cured at the ship's expense — for which see *infra* — has been a question of some difficulty. In the case of an ordinary sickness, not infectious, so as to render the removal of the patient from the ship prudent or necessary, and where no such removal took place, and the ship was properly provided with medicines and directions under the statute, it has been held that the charge of a physician's attendance on board must be borne by the seaman. Holmes *v.* Hutchinson, Gilp. 447. And it has been held that the rule is the same whatever may be the nature of the disease; even if it be of a violent and dangerous kind. Pray *v.* Stinson, 8. Shep. (Maine,) 402. Where the danger is such as to require it, the attendance of a physician may be procured on board without the assent of the seaman, and at his expense. Same cases. But if, from the nature of the disease or other circumstances, there is no person on board by whom the medicines can be safely administered under the printed medical directions accompanying the chest, such attendance will be a charge upon the owners. The Forest, Ware, 420. So if it becomes advisable for the convenience or safety of the rest of the crew, as in cases of contagious disease, that the sick man should be removed on shore whether with or without his consent, so that he has not the benefit of the medicine chest, his expenses for medicine and advice remain a charge upon the ship. Harden *v.* Gordon, 2 Mason, 541; Walton *v.* The Neptune, 1 Pets. Ad. 152; Hastings *v.* The Happy Return, ib. 256, n.; The Forest, *supra;* The Brig George, 1 Sumn. 151. But, *semble*, not where the seaman is removed at his own request from a vessel properly provided in all respects. Pierce *v.* Patten, Gilp. 436. And see the case of Pray *v.* Stinson, *supra*. Cases requiring extraordinary assistance, such as surgical aid, which the ship cannot afford, are not within the spirit of the statute which it seems "is limited to the ordinary cases of illness on board the ship; a sickness of such a character that the patient may be and is kept on board, and receives, or may receive the benefit of the medicine chest and directions, and the advice and assistance of the master of the ship or some other competent person attached to the ship, in the application of the medical directions accompanying the chest, and such nursing and attendance as the situation of the ship may admit." Per *Davis*, J., in Lamson *v.* Westcott, 1 Sumn. 591, Appen. And see the remarks of Peters, J., in Hastings *v.* The Happy Return, 1 Pets. Ad. 256, n. See also the case of Reed *v.* Canfield, 1 Sumn. 195, where a seaman whose feet had been frozen in the service of the ship so that partial amputation became necessary, was allowed to recover the expenses of his care from the owners under the general maritime law. The charge for nursing and attendance are not affected by the act. *Story*, J., in Harden *v.* Gorden, *supra*. Where a seaman contracts a disease by his own vices or faults, and in defiance of the counsel and command of his superior officers, the vessel

a month are deducted from the wages of every seaman to make up a fund for the maintenance of marine hospitals, to which every sick seaman may repair without charge.[1] In addition to this the general law merchant requires every ship-owner or master to provide suitable medicine, medical treatment, and care, for every seaman who becomes sick, wounded, or maimed, in the service of the ship at home or abroad, at sea or on shore; unless this is caused by the misconduct of the seaman himself.[2] This right of cure extends to the officers of the ship, and probably to the master.[3]

Sixth. The right of the seaman to be brought back to his own home, is very jealously guarded by our laws. The master should always present his shipping articles to the consul or commercial agent of the United States, at every foreign port which he visits, but does not seem to be required by law to do this, unless the consul desires it. He must, however, present them to the first boarding officer on his arrival at a home port. And if upon an arrival at a home port from a foreign voyage, it appears that any of the seamen are missing, the master must account

is not chargeable for the expense of his cure. Pierce *v.* Patten, *supra.* A claim by a seaman for expenses of cure is in the nature of a claim for additional wages, and enforceable as such in admiralty. Harden *v.* Gordon, *supra.* The burden of proof as to the sufficiency of the medicine chest, is always upon the owner. The Forest, *supra;* The Nimrod, Ware, 9.

[1] Act of 1798, c. 94; Act of 1799, c. 142, (36); Act of 1802, c. 51; Act of 1811, c. 93. The Act of 1802, § 3, extends a similar provision to the case of boats, rafts, and flats, descending the Mississippi to New Orleans. See the remarks of Justice Story on these acts in Reed *v.* Canfield, 1 Sumn. 200. It is there stated that they had been construed in practice not to impose upon ships and vessels in the whale and other fisheries the payment of hospital money, although their object is "the relief and maintenance of sick and disabled seamen," without the slightest reference to the time, the place, or the manner of their sickness or disability, whether in port or on the ocean, whether in the service of the ship or otherwise; whether from their own fault, or from inevitable casualty. They are auxiliary to and do not supersede the maritime law; hence, they do not affect the claim of a seaman injured in the ship's service in port, to be cured at the expense of the vessel under that law.

[2] Harden *v.* Gordon, 2 Mason, 541; The Ship Neptune, 1 Pets. Ad. 142; Hastings *v.* The Happy Return, ib. 256, n.; Pierce *v.* Patten, Gilp. 436; The Forest, Ware, 420; The Brig George, 1 Sumn. 151; Reed *v.* Canfield, ib. 197; Lamson *v.* Westcott, ib. 591, Appen.; Johnson *v.* Huckins, 6 Law Rep. 311; Laws of Oleron, Art. 7; Laws of Wisbuy, Art. 19; Of the Hanse Towns, Art. 39; Molloy, 243; Viner's Ab. tit. "Mariners," E. 3; L'Ord. de la Marine, liv. 3, tit. 4, art. 11; Valin, Com. tome 1, p. 721; Pothier, Voyages Mar. n. 190; Cleirac, us et Contumes de la Mer, p. 31. "The Maritime Law," said Justice *Story*, in the case of Reed *v.* Canfield, *supra*, "embraces all sickness sustained in the service of the ship and while the party constitutes one of the crew, without in the slightest manner alluding to any difference between their occurring in a home or in a foreign port, upon the ocean or upon tide waters." But neither under that law nor the United States Statutes, is the seaman to receive any compensation or allowance for the effects of the injury. The owners are not in any just sense liable for consequential damages. Same case.

[3] The Brig George, 1 Sumn. 151.

for their absence.[1] If he discharge a seaman abroad with his consent, he must pay to the American consul three months' wages, of which the consul gives two to the seaman, and remits one to the treasury of the United States to form a fund for bringing home seamen from abroad.[2] This obligation does not apply, where the voyage is necessarily broken up by a wreck, or similar misfortune.[3] But proper measures must be taken to re-

[1] Act of Feb. 28, 1803, c. 62. The first section of this act is as follows: "Be it enacted, &c., That, before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs a list, containing the names, places of birth and residence, and a description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of the crew, together with the places of their birth and residence, as far as he can ascertain them; and the said collector shall deliver him a certified copy thereof, for which the collector shall be entitled to receive the sum of twenty-five cents; and the said master shall moreover enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibit the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States at which he shall arrive on his return thereto, and then and there also produce the persons named therein, to the said boarding officer, whose duty it shall be to examine the men with such list, and to report the same to the collector; and it shall be the duty of the collector at the said port of arrival, (where the name is different from the port from which the vessel originally sailed,) to transmit a copy of the list so reported to him, to the collector of the port from which said vessel originally sailed." But the bond was not to be forfeited if it appeared that any seaman was not produced, because discharged in a foreign country with the consent of the consul, or because of the death of such seaman, or his having absconded, or been impressed into other service. The Act of July 20, 1840, c. 23, required the master to produce the list above-mentioned to "any consul, or other commercial agent of the United States, whenever he may deem their contents necessary to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance."

[2] Act of 1803, Feb. 28, c. 62, § 3, "That, whenever a ship or vessel, belonging to a citizen of the United States, shall be sold in a foreign country, and the company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul or commercial agent, to such seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute and may be in such foreign port." The Act of July 20, 1840, c. 23, allows a consul, upon the application both of the master of a vessel and of a mariner under him, to discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages. In Emerson *v.* Howland, 1 Mason, 45, it was held that where seamen were discharged abroad, without the payment of the three months' wages required by the above act, on a libel for wages against the owners of the vessel, the court would enforce the payment of the three months' wages. See also, Orne *v.* Townsend, 4 Mason, 541. But in Ogden *v.* Orr, 12 Johns. 143, the court refused to sustain an action at law brought by a seaman discharged by his own consent, in a foreign port, against the owners of a vessel, to recover two thirds of the three months' wages. The ground taken by the court was that the statute does not require the master to pay the money to the seaman, but to the consul, and that the payment was in the nature of a penalty for the discharge of American seamen in foreign countries.

[3] The Dawn, Ware, 485, S. C. Daveis, 121; The Juniata, Gilpin, 193. But it was

pair the ship if possible,[1] or to obtain her restoration, if captured. And the seamen may hold on for a reasonable time for this purpose, and if discharged before, may claim the extra wages.[2] Our consuls and commercial agents may authorize the discharge of a seaman abroad for gross misconduct, and he then has no claim for the extra wages.[3] On the other hand, if he be treated cruelly, or if the ship be unseaworthy by her own fault, or if the master violate the shipping articles, the consul or commercial agent may direct the discharge of the seaman; and he then has a right to these extra wages, and this even if the seaman had deserted the ship by reason of such cruelty.[4] They may also send our seamen home in American ships, which are bound to bring them for a compensation not to exceed ten dollars each, and the seaman so sent must work and obey as if originally

held that the burden was on the owner, if he would exempt himself from payment, to show that the sale was rendered necessary by unavoidable accident.

[1] The Dawn, Ware, 485; The Juniata, Gilpin, 193; The Saratoga, 2 Gall. 164.

[2] In the Saratoga, 2 Gall. 164, *Story*, J., said: "It has been further argued, that by the capture, the relation between the owners and mariners ceases; so that the latter are not bound to remain by the ship, but are at liberty, without the imputation of desertion, to abandon the voyage. Without deciding whether the rule assumed in some of our own courts be not more reasonable, that the mariners are bound to remain by the ship until a first adjudication, (Brig Elizabeth, Peters, 128;) it is clear that the mariner is not bound to leave the ship. He has a right to remain by her and wait the event. If restored, he is entitled to his wages, if the ship proceed and earn a freight; if condemned, he may lose his wages, though perhaps, under circumstances, with a recompense for his actual services, pending the prize proceedings." But see Lemon *v.* Walker, 9 Mass. 403; Alfridson *v.* Ladd, 12 Mass. 173.

[3] Under the Act of Feb. 28, 1803, c. 62, "a discharge of a seaman in a foreign port, in order to justify a master for not producing him on the return of the vessel, must have been with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent, there residing, signified in writing under his hand and official seal." Any great misconduct only will justify a master in putting an end to the contract with seamen. In Hutchinson *v.* Coombs, Ware, 65, 70, *Ware*, J., after admitting that by the marine law a master could, in certain cases, turn a mariner out of the vessel, said: "But this he cannot do for slight or venial offences, and certainly not for a single offence, unless of a very aggravated character. The cases stated in which a master is permitted to discharge a seaman are, when he is incorrigibly disobedient, and will not submit to do his duty; Thorne *v.* White, 1 Peters, Adm. 175; or if he is mutinous and rebellious, and persists in such conduct; Relf *et al. v.* The Maria, 1 Peters, 186; or guilty of gross dishonesty, as embezzlement or theft; Black *v.* The Louisiana, 2 Peters, 268; or if he is an habitual drunkard, and a stirrer up of quarrels and broils, to the destruction of the discipline of the crew; or by his own fault renders himself incapable of performing his duty." See also, Orne *v.* Townsend, 4 Mason, 451; Smith *v.* Treat, Daveis, 266; Whiton *v.* The Ship Commerce, 1 Peters, Adm. 164; Atkyns *v.* Burrows, 1 Peters, Adm. 244; The Nimrod, Ware, 9. Only gross misconduct or disobedience will justify a master in discharging a mate or other officer. Atkyns *v.* Burrows; The Exeter, 2 Rob. 261; Thompson *v.* Busch, 4 Wash. C. C. 338.

[4] Act of July 20, 1850. As to what acts of cruelty will justify a seaman in deserting, see Steele *v.* Thacher, Ware, 91; Sherwood *v.* McIntosh, Ware, 109. In Ward *v.* Ames, 9 Johns, 138, it was held that, if a seaman is compelled to leave the ship, on account of ill usage and cruel treatment by the master, it is not a case of voluntary desertion, and the seaman is entitled to recover at common law his full wages for the whole voyage.

shipped.[1] Besides this, if a master discharges a seaman in a foreign port, he is liable to a fine of five hundred dollars, or six months imprisonment.[2] And a seaman may recover full indemnity or compensation for his loss of time, or expenses incurred by reason of such discharge.[3]

Seventh. As to the regulation of punishment, flogging has been abolished and prohibited by law. This includes the use of the cat, or a similar instrument, but not necessarily blows of the hand, or a stick, or a rope.[4] Desertion, in maritime law, is distin-

[1] Act of Feb. 28, 1803, c. 62, § 4. The act provides a penalty of one hundred dollars, in case any master refuses to bring home destitute seamen. In Matthews *v.* Offley, 3 Sumner, 115, it was held that an action for this penalty must be brought in the name of the United States.

[2] Act of 1825, c. 276, § 10. In United States *v.* Netcher, 1 Story, 307. *Story*, J., after citing the tenth section of the above act, said: "In my judgment, this section enumerates three distinct and independent offences. 1. The maliciously and without justifiable cause, forcing any officer or mariner on shore in any foreign port. 2. The maliciously and without justifiable cause, leaving such officer or mariner on shore in any foreign port. 3. The maliciously and without justifiable cause, refusing to bring home again all the officers and mariners of the ship in a condition to return, and willing to return on the homeward voyage." See also United States *v.* Ruggles, 5 Mason, 192; United States *v.* Coffin, 1 Sumn. 394.

[3] In Emerson *v.* Howland, 1 Mason, 45, 53, *Story*, J., said: "In some of the adjudged cases, indeed, wages up to the successful termination of the voyage, have been allowed; in others, wages up to the return of the seaman to the country where he was originally shipped, without reference to the termination of the voyage. The Beaver, 3 Rob. 92; The Ship Exeter, 2 Rob. 261; Hoyt *v.* Wildfire, 3 Johns. 518; Brooks *v.* Dorr, 2 Mass. 39; Ward *v.* Ames, 9 Johns. 138; Sullivan *v.* Morgan, 11 Johns. 66; The Polly and Kitty, 2 Peters, Adm. 420, 423, note; The Glocester, 2 Peters, Adm. 403, 406, note; The Little John, 1 Peters, Adm. 115, 119, 120. But these apparent contrarieties are easily reconcilable, when the circumstances of each case are carefully examined. In all the cases, a compensation is intended to be allowed, which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time, and the expenses incurred by the party. It is presumed that after his return home, or after the lapse of a reasonable time for that purpose, the seaman may, without loss, engage in the service of other persons, and where this happens to be the case, wages are allowed only until his return, although the voyage may not then have terminated. On the other hand, if the voyage have terminated before his return, or before a reasonable time for that purpose has elapsed, wages are allowed up to the time of his return, for otherwise he would be without any adequate indemnity. Cases, however, may occur, of such gross and harsh misbehavior, or wanton injustice, as might require a more ample compensation than could arise from either rule." The expenses of the seaman's return are allowed in addition to his wages; but from these expenses his intermediate earnings may be deducted. Hutchinson *v.* Coombs, Ware, 65. Where seamen were turned off from a privateer with lawful cause, they were held to be entitled to their proportion of the prizes taken during their absence. Mahoon *v.* The Glocester, 2 Peter's Adm. 403.

[4] The Act of March 3, 1835, prohibited the beating, wounding, or imprisoning of seamen, from malice, hatred, or revenge, and without justifiable cause. In United States *v.* Cutler, 1 Curtis, 502, where the master was indicted under that act for beating a seaman, *Curtis*, J., said: "The government must prove: 1. The beating; 2. The want of justifiable cause; 3. Malice." But the Act of September, 1850, c. 80, contains this clause: "Provided, that flogging in the navy, and on board vessels of commerce, be, and the same hereby is abolished, from and after the passage of this act." Mr. Justice Curtis, in a charge to the grand jury, delivered at Providence, R. I., November 15, 1853, instructed them that the words "vessels of commerce," in the above statute, included vessels engaged in the whale and other fisheries; that the word "flogging" referred only to

guished from absence without leave, by the intention not to return. This intention is inferred from a refusal to return.[1] If he returns, and is received, this is a condonation of the offence, and is a waiver of the forfeiture.[2] If he desert before the voyage begins, he forfeits the advanced wages, and as much more;[3] but he may be apprehended by a warrant of a justice, and forcibly compelled to go on board, and this is a waiver of the forfeiture.[4] By desertion on the voyage, he forfeits all his wages and all his property on board the ship, and is liable to the owner for all damages sustained in hiring another seaman in his place.[5]

Desertion, under the statute of the United States on this sub-

"punishment by stripes inflicted with a cat-o'-nine-tails, or other instrument capable of inflicting the same kind of punishment," and that the above act was not a penal law, and that no indictment could be framed under it. 1 Curtis, 509.

[1] In Cloutman *v.* Tunison, 1 Sumn. 373, 375, *Story*, J., said: "By the general maritime law, desertion from the ship in the course of the voyage, is held to be a forfeiture of the antecedent wages earned by the party; and this rule is equally as applicable to the officers as it is to the seamen of the ship. It is believed that this rule constitutes a part of the maritime code of every commercial nation, and is founded upon a universal principle of public policy. But still, a very important question remains, upon which much loose and unsatisfactory opinion seems to pervade the community. It is, what, in the sense of the maritime law, constitutes desertion? It is commonly enough supposed, that an absence from the ship, without leave of the proper officer, or in disobedience of his orders, constitutes desertion. But this is certainly a mistake. Desertion, in the sense of the maritime law, is a quitting of the ship and her service, not only without leave, and against the duty of the party, but with an intent not again to return to the ship's duty. There must be the act of quitting the ship, *animo derelinquendi*, or *animo non revertendi*. If a seaman quits the ship without leave, or in disobedience of orders, but with an intent to return to duty, however blamable his conduct may be, and it is certainly punishable by the maritime law, not only by personal chastisement, but by damages by way of diminished compensation—[see 1 Valin, Comm. Lib. 2, tit. 7, art. 3, p. 534; The Ship Mentor, 4 Mason, 84; 3 Kent, Comm. § 46, p. 198, 199, (2d edition)]—it is not the offence of desertion to which the maritime law attaches the extraordinary penalty of forfeiture of all antecedent wages." It was also held, that the desertion must be during the voyage, and hence that leaving the vessel, after she had arrived at her last port of destination, and is moored in good safety in the proper and accustomed place, is not desertion, although it is a violation of the obligation to attend to the unlivery of the cargo. See also Coffin *v.* Jenkins, 3 Story, 108; The Rovena, Ware, 309; The Bulmer, 1 Hagg. 163; The Mentor, 4 Mason, 84; The Two Sisters, 2 W. Rob. 125; The Pearl, 5 Rob. 224.

[2] Miller *v.* Brant, 2 Camb. 590; Beale *v.* Thompson, 4 East, 546; Train *v.* Bennett, 3 Car. & Payne, 3. In Cloutman *v.* Tunison, 1 Sumner, 373, 376, *Story*, J., said: "And even in a case of clear desertion, if the party repents of his offence, and seeks to return to duty, and is ready to make suitable apologies, and to repair the injuries sustained by his misconduct, he is entitled to be received on board again, if he tenders his services in a reasonable time, and before another person has been engaged in his stead, and his prior conduct has not been so flagrantly wrong, that it would justify his discharge."

[3] Act of July 20, 1790, § 2; Cotel *v.* Hilliard, 4 Mass. 664. But absence, with the leave of the master, will not work such forfeiture.

[4] Act of July 20, 1790, § 7; Bray *v.* Ship Atalanta, Bee, 48; Turner's case, Ware, 83. The Act of March 2, 1829, provides for the apprehension and delivery of deserters from foreign vessels. See *In re* Bruni, 1 Barb. 187.

[5] Cloutman *v.* Tunison, 1 Sumner, 373; Coffin *v.* Jenkins, 3 Story, 108; The Rovena, Ware, 309; Spencer *v.* Eustis, 21 Maine, 519.

ject, seems to be a continued absence from the ship for more than forty-eight hours, without leave; and there must be an entry in the log-book of the time and circumstances.[1] But any desertion or absence without leave, at a time when the owner has a right to the seaman's service, is an offence by the law merchant, giving the owner a right to full indemnity.[2]

SECTION XI.

OF PILOTS.

An act of Congress authorizes the several States to make their own pilotage laws;[3] and questions under these laws are cognizable in the State courts.[4] No one can act as pilot, and claim the compensation allowed by law for the service, unless duly appointed. And he should always have with him his commission, which usually designates the largest vessel he may pilot,

[1] Act of July 20, 1790, § 5. In Cloutman *v.* Tunison, 1 Sumner, 381, *Story*, J., said: "To work the statute forfeiture, it is made an indispensable condition, that the mate, or other officer having charge of the log-book, should make an entry therein of the name of such seaman, on the day on which he shall so absent himself; and the entry must not merely state his absence, but that he is absent without leave. The entry on the very day is, therefore, a *sine quâ non*." See also Coffin *v.* Jenkins, 3 Story, 108; Snell *v.* Brig Independence, Gilpin, 140; Spencer *v.* Eustis, 21 Maine, 519; Whitton *v.* Brig Commerce, 1 Peters, Adm. 160; Malone *v.* The Brig Mary, 1 Peters, Adm. 139; The Phœbe *v.* Dignum, 1 Wash. C. C. 48. But the entry on the log-book, although necessary, is not conclusive evidence of desertion. Jones *v.* Brig Phœnix, 1 Peters, Adm. 201. A seaman is subject to the penalty for desertion, if he does not return within forty-eight hours, although he may have been prevented by the sailing of the ship. Coffin *v.* Jenkins, 3 Story, 108.

[2] In Cloutman *v.* Tunison, 1 Sumner, 373, a desertion was not shown, but the second mate was absent without leave during the unlivery of the ship, and a forfeiture of two months' wages was decreed. See also The Baltic Merchant, Edwards, Adm. 86.

[3] Act of Aug. 7, 1789, c. 9, § 4; 1 Stats. at Large, 54. Section 4 of this Act is as follows: "And be it further enacted, that all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." See also the case of Gibbons *v.* Ogden, 9 Wheat. 207. By the Act of March 2, 1837, pilots on the waters which are the boundaries of two States, may be licensed by either State, and may be employed by any vessel going into or out of any port situated on such waters.

[4] Schooner Wave *v.* Ileyer, 2 Paine, C. Ct. 131; Low *v.* Commissioners of Pilotage, R. M. Charlt. (Geo.) 314. But in the case of Hobart *v.* Drogan, 10 Pets. 108, Judge *Story* held that the United States courts have a concurrent jurisdiction with the State courts, to entertain suits for pilotage, even in the case where the pilot's compensation is established by a law of the State in which the action is brought. See also The Schooner Anne, 1 Mason, 508; Ross *v.* Walker, 2 Wilson, 264. The State laws respecting pilotage are not in derogation of the common law, with which they have no connection. They are rather to be classed under the head of the Maritime Law, and are entitled to a liberal construction. Per *Hubbard*, J., in Smith *v.* Swift, *et al.* 8 Metc. 332.

or that which draws the most water.[1] If a pilot offers himself to a ship that has no pilot, and is entering or leaving a harbor, and has not reached certain geographical limits, the ship must pay him pilotage fees, whether his services are accepted or not.[2] As soon as the pilot stands on deck, he has control of the ship.[3] But it remains the master's duty and power, in case of obvious and certain disability, or dangerous ignorance or error, to disobey the pilot, and dispossess him of his authority.[4] If a ship neglect to take a pilot, when it should and can do so, the owners will be answerable in damages to shippers or others for any loss which may be caused by such neglect or refusal.[5] Pilots are themselves answerable for any damage resulting from their own negligence

[1] Commonwealth *v.* Ricketson, 5 Metc. 417, 426; Smith *v.* Swift *et al.* 8 Metc. 332.

[2] Law *v.* Hollingsworth, 7 Term, 160; Phillips *v.* Headlam, 2 B. & Ad. 380; The Batavien, 2 Wm. Rob. 411; Bolton *et al. v.* American Ins. Co. 3 Kent's Comm. 176, n. (*a.*); M'Millan *v.* U. S. Ins. Co. 1 Rice, (S. C.) 248; Commonwealth *v.* Ricketson, 5 Metc. 412, 424; Martin *v.* Hilton, 9 Metc. 371. And see the remarks of *Shaw*, C. J., in Winslow *v.* Prince, 6 Cush. 370. The master is bound to approach the pilot-ground carefully, and if in the night, he must hold out a light, and wait a reasonable time for a pilot, and approach one if he can do so with safety. Bolton *v.* Am. Ins. Co. *supra.* If he neglects to take a pilot when it is in his power to do so, and a loss happens in consequence, the insurers are discharged. Phillips *v.* Haadlam, *supra;* M'Millan *v.* U. S. Ins. Co. *supra.* But see the case of Flanigen *v.* Washington Ins. Co. 7 Barr. (Penn.) 306. If, however, the master at a foreign port, attempts to get a pilot and fails, he may then, in the exercise of his best discretion, endeavor to navigate the vessel himself into port. And for a loss incurred whilst he is so doing, the insurers remain liable. Phillips *v.* Headlam, *supra.* It is not necessary, to constitute a valid "offer of his services," that the pilot should go on board and tender them to the master. If he hail the vessel when the pilot-boat is so near and in such a position that the hail was heard on board the ship, or might have been, if the officers and crew had been on duty, this is a sufficient offer and tender of services. Commonwealth *v.* Ricketson, *supra.*

[3] Snell *v.* Rich, 1 Johns. 305; Yates *v.* Brown, 8 Pick. 23; 3 Kent's Comm. 176.

[4] The Duke of Manchester, 3 Wm. Rob. 480. In this case, Dr. *Lushington* said: "It is, I conceive, the duty of the master to observe the conduct of the pilot, and in the case of palpable incompetency, whether arising from intoxication or ignorance, or any other cause, to interpose his authority for the preservation of the property of his employers. In such a case, the vessel and lives of the crew are not to be risked, because there is a law which, under ordinary circumstances, imposes the responsibility upon the pilot. And in another case (The Diana, 1 Wm. Rob. 131) where the master and mate of the vessel had given up the entire management of the vessel to the pilot, and were diverting themselves in the cabin below, when, through the negligence of the pilot, a collision occurred, the learned judge decided that the accident was occasioned by the joint misconduct of the master, mate, and pilot, and that the owners were responsible therefor. But it is only in extreme cases, that the master is warranted in interfering with the pilot in his proper vocation. Per Dr. *Lushington* in the case of The Maria, 1 Wm. Rob. 110. See further on this subject the dicta in the cases of The Joseph Harvey, 1 Rob. 311; The Girolamo, 3 Hagg. 169, 176; The Christina, 3 Wm. Rob. 27; The Lochlibo, 3 Wm. Rob. 480. And see U. S. *v.* Forbes, Crabbe, 558; and U. S. *v.* Lynch, 2 N. Y. Leg. Obs. 51.

[5] Keeler *v.* Fireman's Ins. Co. 3 Hill, 250; M'Millan *v.* U. S. Ins. Co. 1 Rice, (S. C.) 248. And in an English case, where a vessel, seized on justifiable grounds, as appeared by the condemnation of a part of her cargo, was lost by the neglect of the captors to take a pilot on board, the Court of Admiralty decreed restitution in value against them. See the case of The William, 6 Rob. 316.

or default, and have been held strictly to this liability.[1] The owner is also liable, on general principles, for the default of the pilot, who is his servant.[2]

SECTION XII.

OF MATERIAL MEN.

Maritime law so calls persons employed to repair a ship or furnish her supplies. Such persons, and indeed all who work upon or about her, as stevedores, or persons employed to load or unload a vessel, have a lien on the ship for their charges.[3] There is, however, this important distinction. Material men, by admiralty law, have a lien only on foreign ships, and not on domestic ships.[4] But many of our States have by statute given this

[1] Huggett *v.* Montgomery, 5 Bos. & Pul. 446. But he will be exonerated from liability, if it appear that the accident was owing neither to carelessness nor want of skill on his part, but to a simple miscalculation, where the most prudent man might have erred. The Constitution, Gilpin, 579.

[2] The Neptune, 1 Dods. 467; The Transit, cited in the case of The Protector, 1 Wm. Rob. 45; Yates *v.* Brown, 8 Pick. 23; Williamson *v.* Price, 16 Martin, (Lou.) 399; Bussy *v.* Donaldson, 4 Dall. 206; Pilot-boat Washington *v.* The Saluda, U. S. Dist. Ct. S. C. April, 1831. But see The Protector, 1 Wm. Rob. 45; The Maria, ib. 95; The Agricola, 2 Wm. Rob. 10; The Lochlibo, 3 Wm. Rob. 310.

[3] The Neptune, 3 Hagg. 142; Harper *v.* The New Brig, 1 Gilpin, 536; The Calisto, Daveis, 31. "By the general maritime law," said Judge *Ware* in the latter case, "material men, under which term, in the language of admiralty, are included all persons who supply materials or labor in building or repairing vessels, or furnish supplies which are necessary for their employment, as provisions for the crew, have, in addition to the personal liability of the debtor, a lien on the vessel for their security. It is commonly said, that this principle was borrowed by the maritime, from the civil law; but it seems more probable that it originated in the maritime usages of the middle ages." See also Rich *v.* Coe, Cowp. 636; and Farmer *v.* Davies, 1 Term, 109, where Lord Mansfield expressed an opinion, that a person who supplies a ship with necessaries, generally has such a lien.

[4] In the case of The Zodiac, 1 Hagg. 325, Lord *Stowell* remarked: "In most of the countries governed by the civil law, repairs and necessaries form a lien on the ship herself. In our country, the same doctrine had for a long time been held by the maritime courts, but, after a long contest, it was finally overthrown by the courts of common law, and by the highest judicature in the country—the House of Lords, in the reign of Charles II." The leading cases to this effect which his lordship had probably in view, were Westerdell *v.* Dale, 7 Term, 312; Hoare *v.* Clement, 2 Show. 338; Justin *v.* Ballam, 1 Salk. 34, and Ld. Raym. 805; Watkins *v.* Bernadiston, 2 P. Wms. 367; Wilkins *v.* Carmichael, 1 Dougl. 101; *Ex parte* Hill, 1 Mad. 61; *Ex parte* Shank, 1 Atk. 234; Wood *v.* Hamilton, Abbott on Ship. 147. It has been suggested that these cases left it doubtful whether this doctrine applies or not to the case of a foreign ship repaired in England. (Story's note to Abbott, p. 148.) But in the case of The Neptune, 3 Hagg. 140, Sir *John Nicholl* said: "If an English ship were repaired in France or Holland, material men might there arrest and enforce payment against the ship itself. How far a foreign ship, repaired here, might not be subject to the same right, is a question which it is not necessary now to inquire, for The Neptune is a British ship, and in such cases the municipal courts of this country have so far departed from the rule of the civil law, that they have held that the lien does not extend to the ship itself;

lien to material men on all ships, without distinction.[1] It has been held, that such a lien extends beyond mere repairs, — certainly to alterations, and perhaps to reconstruction, — but not to original building, unless the statute includes ship-building.[2] A

and so far, therefore, this court is restrained, but they have not gone further." And in an earlier case, where an American vessel had been sold in Great Britain to satisfy the mariner's claim for wages, and a surplus remaining in the registry, application was made on behalf of the material men to the court, to have their claims satisfied out of the proceeds, and the above distinction between repairs to British and foreign vessels be insisted on, the court said: "I think that circumstance does make a distinction;" and subsequently, in conformance to what was stated to have been the practice of the court under similar circumstances, decreed payment. The John, 3 Rob. 288. The subject is now regulated by an Act passed in 1840. In this country, the rule, as stated in the text, is well settled in The Brig Eagle, Bee's Adm. 78; The Jerusalem, 2 Gallis. 345; Zane *v.* Brig President, 4 Wash. C. C. 453; The Aurora, 1 Wheat. 105; The General Smith, 4 ib. 438; The St. Jago de Cuba, 9 ib. 409, 416; The Calisto, Daveis, 32; Davis *v.* Child, id. 71; The Brig Nestor, 1 Sumn. 79; Read *v.* The Hull of a New Brig, 1 Story, 245; Leland *v.* Ship Medora, 2 Wood. & Minot, 96; The Barque Chusan, 2 Story, C. C. 460; Buddington *v.* Stewart, 14 Conn. 404; Boon *v.* The Hornet, Crabbe, 426. In The General Smith, *supra*, Judge *Story* said: "Where repairs have been made, and necessaries have been furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty, to enforce his right. But in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the municipal law of the State; and no lien is implied unless it is recognized by that law." The language of Justice *Ware*, in The Calisto, *supra*, is similar in effect. If, when the supplies or repairs are furnished by the material men in the belief that the ship belonged to a foreign port, they were held entitled to the benefit of the lien, although such was not her actual character, as against the owners who had contributed to the acception, and even against the claim of the government, for the forfeiture incurred by an illegal voyage. The St. Jago de Cuba, *supra*. The benefit of this lien has been extended to the lender of money to procure supplies and repairs, where it was shown that it had been actually so expended. Davis *v.* Child, *supra*. Where the shipwright has the actual possession of the vessel, whether foreign or domestic, for the purpose of repairing her, as, where she is in his dock, he is entitled to retain it till he is paid. *Ex parte* Bland, 2 Rose, 91; Franklin *v.* Hosier, 4 B. & Ald. 341; Vibilia, 1 Wm. Rob. 6; The General Smith, *supra;* The Brig Nestor, *supra;* The Schooner Marion, 1 Story, 72.

[1] Acts of New York, Aug. 10, 1798; Purdon's Dig. 79, (Pennsylvania); Mass. Supt. to Rev. Stats. 475; Acts of 1855, c. 231; Rev. Stats. of Maine, (1841,) n. 558; Rev. Laws of Illinois, (1838,) 95; Rev. Stats. of Indiana, (1838,) 120; Acts of Missouri, 1838; and R. C. 1845; Acts of Alabama, 1836 and 1848; Rev. Stats. of Mich. c. 122. In Louisiana, a similar privilege exists under the general Spanish law. See Bourcier *v.* The Schooner Ann, 1 Mart. 165. See also the Civil Code, art. 2748, and the case of Peyroux *v.* Howard, 7 Pets. (U. S.) 341.

[2] See the case of Gould *v.* Thacher, 12 Law Rep. (2 N. S.) 183, in which Justice *Sprague* remarked, with reference to the Statute Lien of 1848, in Massachusetts, which runs as follows: "Whenever a debt is contracted for labor performed or materials used in the construction or repair of, or etc., of any ship or vessel within this commonwealth, such debt shall be a lien on such ship or vessel, etc." This is an important question. It depends mainly on the meaning of the term "construction" in the statute, for the libellant's work being in the nature of "alteration," cannot well be treated as "repair," which is restoration. We must look to the intention of the legislature. The reason of the statute would make it apply to alteration and reconstruction as well as original construction; if the latter only had been intended, the word "building" would seem to have been more natural. Suppose a ship is changed from a brig to a bark, or internal alterations are made to fit a merchantman for a whaleman; or suppose a vessel to be coppered, for the first time, on a change of destination, the

laborer, employed in general work by a shipwright or mechanic, and by him sometimes employed on the vessel and sometimes elsewhere, gets no lien on the vessel for that part of the labor performed about it.[1] These statute liens take precedence of the claims of all other creditors. They may be enforced either in the courts of the State, or in the admiralty court of the district in which the vessel is situated.[2]

reason of the act would apply to these changes as much as to repairs, or to the original building. It is not desirous, on practical subjects and among practical men, to create nice distinctions, where there is no distinction in the reason of the statute.

[1] The Calisto, Daveis, 29. See further on the construction of these statutes, Southwick *v.* Packet-boat Clyde, 6 Blackf. 148; The Hull of a New Ship, Daveis, 199; The Calisto, *supra;* The Ship Robert Fulton, 1 Paine, C. C. 620; George *v.* Skeates, 19 Ala. 738; Lawson *v.* Higgins, 1 Mann. (Mich.) 225; Sarchet *v.* Sloop Davis, Crabbe, 185; Smith *v.* Steamer Eastern R. R. 1 Curtis, C. C. 253; Bailey *v.* Steamboat Concordia, 17 Mis. 357.

[2] Peroux *v.* Howard, 7 Pets. (U. S.) 341; Davis *v.* A New Brig, 1 Gilp. 473; Phillips *v.* Scattergood, id. 6; The Hull of a New Ship, 1 Daveis, 201; Davis *v.* Child, Daveis, 74. In The Schooner Marion, *Story*, J., said: "This is a libel against a domestic ship, for materials furnished and repairs made upon her, in the port of New Bedford, in this district, to which port she belonged at the time of the repairs. Under such circumstances, it is admitted that no lien attaches upon the ship by the general maritime law, as far as it is recognized and enforced in the courts of England and America. But the admiralty courts of this country possess a general jurisdiction in all cases of material men and shipwrights, for work done, and materials furnished for ships engaged or employed in maritime commerce and navigation, which may be exercised *in personam* at all times; but can be exercised *in rem* only upon the maritime law, or, in its silence, where the local law of the State or country where the work or materials are applied, gives a lien. Since the decisions made in the Supreme Court, the question is not, how the lien arises under the local law, whether it be by statute, or by the common or by the municipal law. That is wholly immaterial. The lien is enforced because it is of a maritime nature; and the moment its existence is established, the jurisdiction of the admiralty attaches to it *proprio vigore*." See also Gould *v.* Thacher, 12 Law Rep. (2 N. S.) 183.

CHAPTER XVIII.

OF MARINE INSURANCE.

SECTION I.

HOW THE CONTRACT OF INSURANCE IS MADE.

At the present day Insurance is seldom made by individuals. Formerly, this was the universal custom in our commercial cities. Afterwards, companies were incorporated for the purpose of making insurance on ships and their cargoes; and the manifold advantages of this method have caused it to supersede the other.

The contract of insurance binds the insurer to indemnify the insured against loss or injury to certain property or interests which it specifies, from certain perils which it also specifies. The consideration for this obligation on the part of the insurer is the premium paid to the insurer, or promised to be paid to him by the insured.[1] The instrument in which this contract is expressed is called a Policy of Insurance. But no instrument is essential to the validity of the contract; for if the proposals of the insured are written in the usual way in the proposal book of the insured, and signed by their officer with the word "done" or "accepted," or in any way to indicate that the bargain is made, it is valid, although no policy be delivered;[2] and would be construed as an insurance upon the terms expressed in the policy commonly used by that company. We think a contract of insurance which was merely oral, if otherwise unobjectionable, would be valid. But on this subject there is a diversity of opinion.[3] If

[1] Emerigon says, "The word premium comes either from the word *præmium*, signifying price, or from the word *primò*, because formerly the premium was paid before all, and at the time of signing the policy." Ch. 3, sect. 1.

[2] Kohne *v.* Ins. Co. of North America, 1 Wash. C. C. 93; Blanchard *v.* Waite, 28 Maine, 51; Loring *v.* Proctor, 26 Maine, 22. The contract may be contained in letters. Tayloe *v.* Merch. Fire Ins. Co. 9 How. 390; M'Culloch *v.* The Eagle Ins. Co. 1 Pick. 278.

[3] There seems to be no reason why the general principle both of the common and of the civil law, that the evidence of a contract need not be in writing, unless expressly required so to be, *scriptura necessaria non est, nisi lex eum expressi requirat*, should not

proposals are made, on either side, by letter, and accepted by the other party, also by letter, this is a valid contract of insurance as soon as the party accepting has mailed his letter to that effect, if he have not previously received notice of a withdrawal of the proposals.[1]

The form of the policy is generally that which has been used for many years both in England and in this country, with such changes and modifications only as will make it express more accurately the bargain between the parties. And for this purpose it may be and is varied at pleasure.

It is subscribed only by the insurers; but binds both parties.[2]

make a parol contract of insurance valid. See Smith *v.* Odlin, 4 Yeates, 468; Walden *v.* Louis. Ins. Co. 12 La. 134; and Cockerill *v.* Cincinnati Mut. Ins. Co. 16 Ohio, 148. In the last case it was not necessary to decide the question, as the charter of the company required the contract to be in writing. In England, the contract is required to be in writing. Stat. 35, Geo. 3, c. 63. And a writing is necessary under several foreign codes, although in the absence of express provisions it would not be. See Emerigon, c. 1, § 1. In McCulloch *v.* Eagle Ins. Co. 1 Pick. 280, *Parker*, C. J., says: "And it is certain that if a contract was made, the mere want of a policy will not prevent the plaintiff from recovering." In Hamilton *v.* Lycoming Mut. Ins. Co. 5 Barr. 339, a parol agreement to insure was enforced. See also Tayloe *v.* Merchants' Ins. Co. 9 How. 390. The language of the court in the case of Real Estate Mut. Fire Ins. Co. *v.* Roessle, 1 Gray, 336, seems to imply that the contract would not be complete till the policy should be delivered. The action was brought by the company to recover the amount of the premiums, deposit notes, and assessments upon two policies of insurance. The policies were made out, but the defendant refused to receive them. The case was submitted without argument, and no authorities are cited by the court. The judgment was for the defendant. Mr. Justice *Dewey*, in delivering the opinion of the court, puts this question: "Suppose a loss by fire had occurred, and the buildings, the subject of the proposed insurance, had been destroyed, would any liability have thereby attached to the plaintiffs, by reason of these policies? Clearly not; because they had not been delivered to the defendant." The question came before Mr. Justice Curtis in the Circuit Court, in the case of The Union Mut. Ins. Co. *v.* The Commercial Mut. Mar. Ins. Co. (Law Reporter, March, 1856, p. 610.) A bill in equity was brought by the complainants to compel the specific performance of a contract for re-insurance on The Great Republic. The agent of the plaintiffs went to the office of the defendants on the 24th of December. The president not being in, he filled up a blank proposal in the usual form. He called again that day and saw the president who offered to make the insurance at a certain rate. The agent said he would consult with his principal, to which the president assented; and on Monday, the 26th, receiving an answer accepting, he saw the president and told him that the offer was accepted. The rate, as agreed on, was inserted in the proposal. That night the vessel was destroyed by fire. The proposal was in the usual form, with "Binding," and a blank left for the president's name. This blank had not been filled up. Mr. Justice *Curtis* held that the contract was complete as soon as the proposal was accepted.

[1] Tayloe *v.* Merchants' Ins. Co. 9 How. 390; Dunlop *v.* Higgins, 1 House of Lords Cas. 381; Duncan *v.* Topham, 8 C. B. 225; Mactier *v.* Frith, 6 Wend. 103. The case of McCulloch *v.* Eagle Ins. Co. 1 Pick. 281, has not been sustained by subsequent cases. See 1 Parsons on Cont. 406, and the cases there cited.

[2] Ins. Co. of Penn. *v.* Smith, 3 Whart. 526, 529; Patapsco Ins. Co. *v.* Smith, 6 Har. & Johns. 166. But the obligation of the assured differs from that of the underwriter. No action can be maintained against the former for the breach of any condition contained in the policy. Although the policy may have been signed and accepted by the assured, he will not be liable for the premium, unless he chooses to have the risk commence. Tyrie *v.* Fletcher, Cowper, 666; Molloy, b. 2, c. 7, § 12; Emerigon, c. 3, § 1.

The insured are bound for the premium, although no note is given.[1] The date may be controlled by evidence showing when it was made and delivered; and if delivered after its date, it takes effect at and from its date if that were the intention of the parties.[2]

It may be effected on application of an agent of the insured, if he have full authority for this purpose; which need not be in writing. But a mere general authority, even if it related to commercial matters, or to a ship itself, as that of a "ship's-husband," is not sufficient.[3]

A party may be insured who is not named, if "for whom it may concern," or words of equivalent import are used. But a party who seeks to come in under such a clause must show that he was interested at the time the insurance was made, and that he was in the contemplation of the party asking insurance.[4] The phrase "on account of owners at the time of loss," or an equivalent phrase, will bring in those who were intended, if they owned the property when the loss occurred, although there were assignments and transfers between the time of insurance and the loss.[5]

Each person, whose several interest is actually insured by any such general phrase, may sue in his own name.[6]

If the nominal insured is described as "agent" generally, this is equivalent to "for all whom it may concern."[7] And an in-

But, by established usage, the underwriter is entitled to a small percentage of the amount insured, or of the premium, if the assured defeat the contract voluntarily. But if the risk actually commences, the assured must comply with the terms of the policy or lose his right to recover in case of loss, and in this sense the policy is binding upon him. See *infra* as to Warrantees.

[1] See *infra*, § 2.

[2] Lightbody *v.* North American Ins. Co. 23 Wend. 18.

[3] French *v.* Backhouse, 5 Burr. 2727. A consignee of goods is not authorized to insure under ordinary circumstances, and in the absence of any usage requiring it. Randolph *v.* Ware, 3 Cranch, 503; Kingston *v.* Wilson, 4 Wash. C. C. 310; De Forest *v.* Fulton Ins. Co. 1 Hall, 84. Nor has a master, as such, authority to insure; nor a part-owner, to insure for the other part-owners. Foster *v.* United States Ins. Co. 11 Pick. 85; Hooper *v.* Lusby, 4 Camp. 66.

[4] Newson *v.* Douglass, 7 Har. & Johns. 417; Lambeth *v.* Western Fire & Mar. Ins. Co. 11 Rob. La. 82; Seamans *v.* Loring, 1 Mason, 127. In Newson *v.* Douglass, *Buchanan*, C. J., said: "'Whom it may concern' is a technical phrase, common to policies of insurance, and is understood to mean not any and everybody, who may chance to have an interest in the property insured, but such only as are in the contemplation of the contract. Such a policy supposes an agency and proceeding upon that ground, looks only to the principal in whose behalf, or on whose account, the agent moves in the transaction; and he for whose benefit the insurance is procured, is the person in the contemplation of the contract — is he whom it alone concerns."

[5] Rogers *v.* Traders' Ins. Co. 6 Paige, 583.

[6] Aldrich *v.* The Equitable Safety Ins. Co. 1 W. & Min. 272; Blanchard *v.* Dyer, 21 Maine, 111.

[7] Davis *v.* Boardman, 12 Mass. 80; Russell *v.* The N. E. Mar. Ins. Co. 4 Mass. 82. See also Hibbert *v.* Martin, 1 Camp. 538.

surance "for ———" will be read as for all whom it may concern if that were intended.[1] So, if the designation of the insured be common to many persons, the intention must decide for whom it is made.[2] Whatever is written on any part of the sheet containing the policy,[3] or even on a separate paper, if referred to or signed by the parties as a part of the policy, is thereby made a part of it.[4] But things said by either party while making their bargain, written on other paper and not so referred to or signed, form no part of it.[5] The policy may expressly provide that its terms shall be made definite, especially as to the property insured, by subsequent indorsements or additions.[6]

Alterations may be made at any time by consent.[7] But a material alteration by the insured, without the consent of the insurer, discharges him; although it was made honestly, in the hope or belief of having his consent.[8] A court of equity will correct a material mistake of fact.[9]

[1] Turner *v.* Burrows, 8 Wend. 144; S. C. 24 Wend. 276.

[2] Church *v.* Hubbart, 2 Cranch, 187; Carruthers *v.* Sheddon, 6 Taunt. 14.

[3] Dennis *v.* Ludlow, 2 Caines, 111; Bean *v.* Stupart, 1 Doug. 11; Kenyon *v.* Berthan, 1 Doug. 12, n. 4; Guerlain *v.* Col. Ins. Co. 7 Johns. 527; Ewer *v.* Washington Ins. Co. 16 Pick. 502; De Hahn *v.* Hartley, 1 Term, 343; Fowler *v.* Ætna F. Ins. Co. 6 Cowen, 673; S. C. 7 Wend. 270. In Murdoch *v.* Chenango Mut. Ins. Co. 2 Comst. 210, the policy was on one half of an entire sheet, and on the other half there was a printed statement, headed "Conditions of Insurance;" no reference was made to it in the body of the policy. Held, that it formed part of it.

[4] Routledge *v.* Burrell, 1 H. Bl. 254; Worsley *v.* Wood, 6 Term, 710. The application for insurance, if referred to, forms part of the policy. Murdoch *v.* Chenango Mut. Ins. Co. 2 Comst. 210.

[5] Chief Justice *Parker*, in giving the opinion of the court, in Higginson *v.* Dall, 13 Mass. 96, says: "Policies, though not under seal, have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence, which govern in the case of specialties. The policy itself is considered to be the contract between the parties, and whatever proposals are made, or conversations had, prior to the subscription, they are to be considered as waived, if not inserted in the policy or contained in a memorandum annexed to it." N. Y. Ins. Co. *v.* Thomas, 3 Johns. Cases, 1. "The admission of such testimony would be mischievous and inconvenient." Per *Kent*, J.; New York Gas Light Co. *v.* Mechanics' Fire Ins. Co. 2 Hall, 108. The slip or application for insurance is not admissible to aid in the construction of the policy, except in the case of a latent ambiguity. It may be also used when there is a misrepresentation. Dow *v.* Whetten, 8 Wend. 160. In Norris *v.* Ins. Co. of North America, 3 Yeates, 84, it was admitted to aid in construing the policy. See also Hogan *v.* Delaware Ins. Co. 1 Wash. C. C. R. 419.

[6] Langhorn *v.* Cologan, 4 Taunton, 330. A policy of this kind is called an open or running policy, and is the form most in use by mutual companies.

[7] Robinson *v.* Tobin, 1 Stark. 336; Merry *v.* Prince, 2 Mass. 176; Warren *v.* Ocean Ins. Co. 16 Maine, 439. In Kennebec Ins. Co. *v.* Augusta Ins. & Banking Co. Sup. Jud. Court, Mass., March term, 1856, *Merrick*, J., says: "It is now, however, a perfectly well-settled doctrine, that a written contract may be materially varied and changed by subsequent agreement, orally entered into by the parties before there has been a breach of its stipulations." Goss *v.* Lord Nugent, 5 B. & Ad. 58.

[8] Master *v.* Miller, 4 Term, 320; Sanderson *v.* M'Cullom, 4 J. B. Moore, 5; Langhorn *v.* Cologan, 4 Taunt. 330; Fairlie *v.* Christie, 7 Taunt. 416; Campbell *v.* Christie, 2 Stark. 64; Forshaw *v.* Chabert, 3 Brod. & Bing. 158.

[9] Graves *et al.* *v.* Boston Mar. Ins. Co. 2 Cranch, 441; Andrews *v.* Essex F. & M.

A policy may be assigned, and the assignee may sue in the name of the assignor. If the assignment be assented to by the insurer, this does not always make a contract between him and the assignee, on which he may sue in his own name.[1] If the loss is made by the policy payable "to order" or to "bearer," it will then be negotiable by indorsement or delivery, but it is not certain that the transferree can even then sue in his own name.[2] But if the insured transfers the property, unaccompanied by a transfer of the policy with consent of the insured, this discharges the policy, unless it was expressly made for the benefit of whoever should be owner at the time of the loss, as before stated.[3]

Ins. Co. 3 Mason, 6; Phœnix Fire Ins. Co. *v.* Gurnee, 1 Paige, 278. The evidence of the mistake must in all cases be clear and satisfactory. Franklin Fire Ins. Co. *v.* Hewitt, 3 B. Munroe, 231. "Now I take the rule to be, that if by mistake, a deed be drawn, plainly different from the agreement of the parties, a court of equity will grant relief, by considering the deed as if it had conformed to the agreement. If the deed be ambiguously expressed, so that it is difficult to give it a construction, the agreement may be referred to in order to explain such ambiguity." Per *Washington*, J. Hogan *v.* Delaware Ins. Co. 1 Wash. C. C. R. 419; see also Dow *v.* Whetten, 8 Wend. 160.

[1] Jessel *v.* Williamsburgh Ins. Co. 3 Hill, 88. *Per Curiam:* "We know of no principle upon which the assignee of a policy of insurance can be allowed to sue upon it in his own name. The general rule applicable to personal contracts is, that, if assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has expressly promised the assignee to respond to him." The policy in this case contained the usual clause that the interest of the insured should not be assigned without the consent of the corporation. The insured assigned his interest with their consent, and the assignee sued in his own name. The court held that the action should have been brought in the name of the assignor, and the plaintiff therefore, was nonsuited. See also Howard *v.* Albany Ins. Co. 3 Denio, 305. The later cases in New York, where assignees have sued in their own names, have been brought under the new code, c. 4, tit. 3, which provides that all actions are to be brought by the real parties in interest. 2 N. Y. Rev. Stat. p. 499. The transfer of the entire interest of the insured, together with the assent of the underwriter to the assignment of the policy, will be considered a promise on his part to make payment to the assignee, and he may then sue in his own name. Carroll *v.* Boston Mar. Ins. Co. 8 Mass. 515; Howard *v.* Albany Ins. Co. 3 Denio, 301; Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. 570.

[2] By the law of France, policies of insurance may be made negotiable by making the loss payable to order, or to bearer. Emerigon, c. 18, § 2; 2 Valin, 45; Alauzet, 360; 2 id. 135; see 2 Duer on Ins. 51, 52. It may perhaps be doubted whether in England, and in this country, an assignee of such a policy could maintain an action upon it in his own name. It has been held in England, that a bill of lading was not such a negotiable instrument that an indorsee could maintain an action upon it in his own name. Thompson *v.* Dominy, 14 Meeson & Welsb. 403. The same point is decided in a late case in 9 Common Bench, 297, Howard *v.* Shepherd. *Maule*, J., says: "Now it is perfectly clear that a contract cannot be transferred so as to enable the transferree to sue upon it in his own name." In Skinner *v.* Somes, 14 Mass. 107, the plaintiff declared upon a bond made by the defendant to the assignor of the plaintiff and by him assigned to the plaintiff. The court held that though the word "assigns" was in the bond, this would not entitle the assignee to sue in his own name.

[3] The party with whom the contract was made, cannot sue, for "the insured must have an interest at the time of the loss as well as when the contract is made." Per *Bronson*, C. J., in Howard *v.* Albany Ins. Co. 3 Den. 301; and the assignee cannot sue, for the contract was not made with him originally, and he has not become a party to it with the consent of the underwriter. Lynch *v.* Dalzell, 4 Brown, Parl. Cases, 431; The

There is usually a clause to the effect that the policy is void if assigned without the consent of the insurers. But this does not apply to an assignment by force of law, as in a case of insolvency; or in a case of death.[1] And after a loss has occurred, the claim against the insurers is assignable.[2] And a seller who remains in possession of the property as trustee for the purchaser,[3] or a mortgagor retaining possession, may retain the policy and preserve his rights.[4]

SECTION II.

OF THE INTEREST OF THE INSURED.

The contract of Insurance is a contract of indemnity for loss. The insured must therefore be interested in the property at the time of the loss.[5] The value to be paid for may be agreed upon beforehand and expressed in the policy, which is then called a *valued policy;* or left to be ascertained by proper evidence, and the policy is then called an *open policy.*[6]

This valuation, if in good faith, is binding on both parties,

Sadlers' Co. *v.* Badcock, 2 Atk. 554; Wilson *v.* Hill, 3 Met. 66; Murdock *v.* Chenango Mut. Ins. Co. 2 Comst. 210.

[1] The term "alienate" is said, by the Supreme Court of New York, to mean a conveyance of the title to the estate, and nothing short of this will amount to an alienation. Masters *v.* Madison Co. Mut. Ins. Co. 11 Barb. 624. Thus it has been held that a mortgage on real estate is not an alienation. Conover *v.* Mutual Ins. Co. of Albany, 1 Comst. 290; S. C. 3 Denio, 254; Jackson *v.* Mass. Mut. F. Ins. Co. 23 Pick. 418. Nor a mortgage of personal property, without a transfer of possession to the mortgagee. Rice *v.* Tower, 1 Gray, 426. See also Holbrook *v.* Am. Ins. Co. 1 Curtis, 193. Nor a levy on execution, Clark *v.* N. Eng. Mut. F. Ins. Co. 6 Cush. 342; Rice *v.* Tower, 1 Gray, 426; nor a sale of the equity of redemption so long as the party has the right to redeem. Strong *v.* Manufacturers' Ins. Co. 10 Pick. 40. If the insured die intestate, his death works no alienation, because his heirs take by descent, and not by any act of his. Burbank *v.* Rockingham M. F. Ins. Co. 4 Foster, 550. In Dreher *v.* Etna Ins. Co. 18 Missouri, 128, it was held that a dissolution of a partnership, before loss, and a division of the goods, was such a change of title that the underwriters would be discharged. Whether a sale by one joint-owner or partner to the other joint-owners or partners is an alienation, see Breasted *v.* The Farmers' Loan & Trust Co. 4 Selden, 299; Tillou *v.* Kingston Mut. Ins. Co. 7 Barb. 570; Same case, 1 Selden, 405; Murdock *v.* Chenango Mut. Ins. Co. 2 Comst. 210. See next chapter, on Insurance against Fire.

[2] Brichta *v.* N. Y. La Fayette Ins. Co. 2 Hall, 372.

[3] Powles *v.* Innes, 11 Mee. & Wels. 10; Reed *v.* Cole, 3 Burrow, 1512; Morrison's Adm. *v.* Tennessee M. & F. Ins. Co. 18 Missouri, 262.

[4] Gordon *v.* Mass. Fire & Mar. Ins. Co. 2 Pick. 249; Lazarus *v.* Commonwealth Ins. Co. 5 Pick. 76; Stetson *v.* Mass. Mut. F. Ins. Co. 4 Mass. 330; Hibbert *v.* Carter, 1 Term, 745; Irving *v.* Richardson, 2 Barn. & Ad. 193; Bell *v.* Western M. & F. Ins. Co. 5 Rob. Louis. 423.

[5] See *supra*, p. 407, n. 3.

[6] An open policy is also one where the property insured is to be inserted by subsequent indorsements. See *supra*, p. 406, n. 6.

even if it be very high indeed.[1] But a *wager policy*, that is, one without interest, is void;[2] and if there be some interest, the valuation may be so excessive as to be open to the objection that the interest is a mere cover, and that the contract is only one of wager.[3] So the valuation is void if fraudulent in any respect; as if it cover an illegal interest or peril.[4]

The insured may apply his valuation to the whole property, or to that part of it which he wishes to insure; thus he may cause himself to be insured for one half of a cargo, the whole of which is valued at $20,000 — or one half, which half is valued at $20,000; and which of these things is meant will be determined by a reasonable construction of the language used. If he owns the whole, the valuation, in general, will be held to apply to the whole; and only to a part if he owns only a part.[5]

He may value one thing insured and not another;[6] or may value the same thing in one policy and not in another, and then the valuation does not affect the policy which does not contain

[1] Hodgson *v.* The Marine Ins. Co. of Alexandria, 5 Cranch, 100; S. C. 6 Cranch, 206. In this case, the ship was valued at $10,000, and insured for $8,000. The court held that it would not necessarily avoid the contract, nor restrict damages to that sum, if it were proved that the actual value of the vessel was no more than $8,000, because she might have fairly cost her owners the whole amount of her valuation. Coolidge *v.* Gloucester Marine Ins. Co. 15 Mass. 341; Miner *v.* Tagert, 3 Binn. 204.

[2] In New York, before they were prohibited by the Revised Statutes, wager policies were held to be valid. Juhel *v.* Church, 2 Johns. Cas. 333. In Amory *v.* Gilman, 2 Mass. 1, *Dana*, C. J., says: "As wager policies are injurious to the morals of the citizens, and tend to encourage an extravagant and peculiarly hazardous species of gaming, they ought not to receive the countenance of this court." See also Stetson *v.* Mass. Mut. F. Ins. Co. 4 Mass. 336; Lord *v.* Dall, 12 Mass. 115; Alsop *v.* Commercial Ins. Co. 1 Sumner, 464. All wagers, upon matters in which the parties have no interest, are void contracts. Hoit *v.* Hodge, 6 N. H. 104; Pritchet *v.* Ins. Co. of N. America, 3 Yeates, 458.

[3] Clark *v.* Ocean Ins. Co. 16 Pick. 289, 296; Wolcott *v.* Eagle Ins. Co. 4 Pick. 429. In Lewis *v.* Rucker, 2 Burrow, 1171, Lord *Mansfield* says: "There are many conveniences from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion."

[4] "It may be laid down as a general rule, that, where a voyage is illegal, an insurance upon such voyage is invalid." Per *Tindal*, C. J., Redmond *v.* Smith, 7 Mann. & Grang. 474. See Mount *v.* Waite, 7 Johns. 434. But if the voyage is known to the underwriter to be illegal, at the time when he makes the contract, then he cannot say the contract is not valid. Archibald *v.* The Mercantile Ins. Co. 3 Pick. 70, 73; Pollock *v.* Babcock, 6 Mass. 234; Richardson *v.* Maine Ins. Co. 6 Mass. 102. See Sect. III. *post.*

[5] Feise *v.* Aguilar, 3 Taunt. 506; Dumas *v.* Jones, 4 Mass. 647. The insurance in this case was on freight valued at $5,000, for which amount the plaintiff caused himself to be insured. It was proved that the insurance was made on the joint account of the plaintiff and another person, though this fact was not known to the insurers at the time the contract was made. The court held that as the whole interest of the plaintiff was covered by other underwriters, he could not recover any thing in this suit. See Mayo *v.* Maine Fire & M. Ins. Co. 12 Mass. 259; Murray *v.* Columbian Ins. Co. 11 Johns. 302.

[6] The ship may be valued and not the cargo. Riley *v.* Hartford Ins. Co. 2 Conn. 368.

it.[1] If only a part of the goods included in the valuation are on board and at risk, it applies to them *pro rata*.[2] A valuation of an outward cargo will, generally, be taken as a valuation of a return cargo, substituted for the other by purchase and covered by the same policy.[3] And a valuation will cover the insured's whole interest in the thing valued, including the premium, unless a different purpose is expressed or indicated.[4]

A valuation of freight applies to the freight of the whole cargo; and if a part only be at risk, it applies *pro rata*.[5] And it applies either to the whole voyage, or to freight earned by voyages which form parts of the whole, as may be intended and expressed.[6]

If profits are insured as such they are generally valued, but may be insured by an open policy.[7] If they are valued, the loss of the goods on which the profits were to have been made, imports in this country a loss of the valued profits, without proof that there would have been any profit whatever; it seems to be necessary in England to show that there would have been some profit, and then the valuation attaches.[8]

It is very common to insure profits, in fact, by a valuation of the goods sufficiently high to include all the profits that can be made upon them.[9]

[1] Higginson *v.* Dall, 13 Mass. 96. In this case, a vessel was insured in Boston on an open policy, and afterwards insured on a valued policy in Calcutta. A total loss having occurred, it was settled under the Boston policy without regard to the value expressed in the other. See also, Bousfield *v.* Barnes, 4 Camp. 228; Minturn *v.* Col. Ins. Co. 10 Johns. 75; Kane *v.* Com. Ins. Co. 8 Johns. 229.

[2] Wolcott *v.* Eagle Ins. Co. 4 Pick. 429. "If by mistake or design, the assured should put on board only part of the goods to which he intended the valuation should apply, we think it clear that he could not recover as if the whole subject-matter of the valuation had been put on board; but that in case of loss, he should recover such proportion of the valuation as the goods which were on board and at risk, should bear to the whole valuation. Per *Putnam*, J., Forbes *v.* Aspinall, 13 East, 323; Clark *v.* Ocean Ins. Co. 16 Pick. 289, 295.

[3] This is entirely a question of construction. The intent of the parties, as it appears on the face of the policy, will in all cases govern. Haven *v.* Gray, 12 Mass. 74; M'Kim *v.* Phœnix Ins. Co. 2 Wash. C. C. 89; Whitney *v.* American Ins. Co. 3 Cowen, 210; S. C. 5 Cowen, 712.

[4] Brooks *v.* Oriental Ins. Co. 7 Pick. 259; Minturn *v.* Col. Ins. Co. 10 Johns. 75; Ogden *v.* Col. Ins. Co. 10 Johns. 273.

[5] See *supra*, n. 2.

[6] In Wolcott *v.* Eagle Ins. Co. 4 Pick. 429, it was assumed that, in a policy on freight for a year, with a valuation, the valuation was of the freight of each successive passage separately. See also Hughes *v.* Union Ins. Co. 8 Wheat. 294; Davy *v.* Hallett, 3 Caines, 16; Patapsco Ins. Co. *v.* Biscoe, 7 Gill & Johns. 293.

[7] Mumford *v.* Hallett, 1 Johns. 439; Benecke on Ins. 28.

[8] Patapsco Ins. Co. *v.* Coulter, 3 Peters, 222; Barclay *v.* Cousins, 2 East, 544; Hodgson *v.* Glover, 6 East. 316; Eyre *v.* Glover, 16 East, 218.

[9] Alsop *v.* Commercial Ins. Co. 1 Sumner, 451, 469. In this case, the profits were

In an open policy, where the value insured is to be determined by evidence, the value of the property — whether ship or goods — which is insured, is their value when the insurance took effect, including the premium of insurance; as the law of insurance intends indemnifying the assured, as accurately as may be, for all his loss.[1] If a ship be insured, its value throughout the insurance is the same as at the beginning, without allowance for the effect of time upon it.[2] And all its appurtenances, in a mercantile sense of this phrase, enter into this value.[3]

While the value does not vary with time, the interest of the insured at the time of the loss, is that on which he founds his claim.[4]

If the insurance is on goods on successive passages, and at the close of one the goods are sold at a profit, and the whole proceeds invested in the cargo put on board, this increased value enters into the value.[5] Generally, the value of goods is their invoice price, with all those charges, commissions, wages, &c.,

valued at $20,000. The plaintiff had on board bullion of the invoice value of $11,821, and hides of the value of $7,765. Mr. Justice *Story* says, p. 473: "There is something, too, in the nature of an insurance on profits, which distinguishes it from any other insurance, whether on ships, or on goods, or on freight. The latter are generally susceptible of an exact valuation. But profits are not. It is not sufficient to justify the court in setting aside the present verdict upon this ground, that it should doubt whether the over valuation was innocent. It must clearly see that it was fraudulent." See also Robinson *v.* Manufacturers' Ins. Co. 1 Met. 143.

[1] Shawe *v.* Felton, 2 East, 109; Le Roy *v.* United Ins. Co. 7 Johns. 343. In Usher *v.* Noble, 12 East, 639, Lord *Ellenborough* lays down the rule as follows: "In the case of a valued policy, the valuation in the policy is the agreed standard; in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value." In Carson *v.* Marine Ins. Co. 2 Wash. C. C. 468, there was a total loss of goods insured on an open policy. Mr. Justice *Washington* held that the market price at the loading port and not the invoice price, was to be taken as the measure of damages.

[2] Shawe *v.* Felton, 2 East, 109; Weskett on Ins. 304, n. 9; Snell *v.* Delaware Ins. Co. 4 Dallas, 430.

[3] Kemble *v.* Bowne, 1 Caines, 80; 1 Emerigon, 277; Shawe *v.* Felton, 2 East, 109.

[4] See cases cited, *ante*, p. 407, n. 3.

[5] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383. In this case, the sum of $10,000 was insured on a cargo of flour from Alexandria to St. Thomas, and two other ports in the West Indies, and back to the port of discharge in the United States. More than $3,000 worth of the flour was sold at St. Thomas, and the vessel was afterwards wrecked. At the time the vessel sailed, the value of the flour on board amounted to more than $16,000; at the time of the loss, over $12,000. The question arose whether at the time of the loss, the policy covered the cargo then on board, to the whole amount underwritten, or only twelve sixteenths of it, that is the portion covered at the commencement of the risk. It was held that the policy covered $10,000 during the whole voyage, out and home, so long as the insured had that amount on board. And that the loss must be apportioned between the parties in the proportion which the sum insured bore to the amount of the value on board at the time of the loss. See Meech *v.* Philadelphia F. & Inland Nav. Ins. Co. 3 Wharton, 473.

which enter into the cost to the owner, when the risk commences.[1] The drawback is not deducted;[2] and the expenses incurred after the risk begins, as for freight, are not included.[3] And the rate of exchange at the beginning of the risk is taken.[4]

SECTION III.

OF THE INTEREST WHICH MAY BE INSURED.

A mere possibility or expectation cannot be insured;[5] but any actual interest may be. If one has contracted to buy goods, he may insure them, and will recover if the property be in him at the time of the loss.[6] Or if one has taken on himself certain risks, or agreed to indemnify another for them, he may insure himself against the same risks.[7] The policy may express and define the interest in such a way that any change in the nature of it will discharge the insurance. If it is not so defined, a change, as from the interest of an owner to that of a mortgagor, or of a mortgagee, will not defeat the policy.[8]

[1] In Coffin *v.* Newburyport Mar. Ins. Co. 9 Mass. 436, the invoice price, which was their real value at the time, and price of shipment, was held to be the true standard. In Le Roy *v.* United Ins. Co. 7 Johns. 343, the prime cost was taken. Mr. Justice *Washington* contends, on the other hand, that the true rule is the actual market value at the time of effecting the insurance. Carson *v.* Marine Ins. Co. 2 Wash. C. C. 468; see also, Gahn *v.* Broome, 1 Johns. Cas. 120. To the price is to be added all sums paid for labor, storage, expense of transportation, and commissions paid to agents and factors. Fontaine *v.* Col. Ins. Co. 9 Johns. 29.

[2] Gahn *v.* Broome, 1 Johns. Cas. 120; Minturn *v.* Col. Ins. Co. 10 Johns. 75.

[3] Gibson *v.* Phil. Ins. Co. 1 Binney, 405.

[4] Thelluson *v.* Bewick, 1 Esp. 77.

[5] Stockdale *v.* Dunlop, 6 Mee. & Welsb. 224. In this case, the plaintiffs made a verbal contract to purchase of third parties 50 tons of palm oil. They then insured their interest in it. *Held*, that they could not recover because the contract for the purchase was incapable of being enforced. In Devaux *v.* Steele, 6 Bing. N. C. 358, it was shown that the French government sometimes granted a bounty to vessels, which performed a similar voyage to the one in question. *Held*, that this did not constitute such a vested interest, as would entitle the owners to insure their expectation. See also Brown *v.* Williams, 28 Maine, 252.

[6] McGivney *v.* Phœnix Fire Ins. Co. 1 Wend. 85. In this case it was decided that a person who was in possession of a house, and had agreed to purchase the same, who had made partial payments and repaired the premises, had an insurable interest in the house. See also, Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25; Rider *v.* Ocean Ins. Co. 20 Pick. 259.

[7] Oliver *v.* Greene, 3 Mass. 133; Crowley *v.* Cohen, 3 B. & Ad. 478; Merry *v.* Prince, 2 Mass. 176. "Reinsurance is a valid contract at the common law. It is forbidden in England, except where the insurer shall be insolvent, become bankrupt or die, by the statute 19 Geo. 2, c. 37, § 4." Per *Bronson*, J., New York Bowery Ins. Co. *v.* New York Fire Ins. Co. 17 Wend. 359.

[8] See *ante*, p. 408, n. 4.

A mere indebtedness to a party on account of property, gives the creditor no insurable interest; as if one repaired a house or a ship; but if the creditor has a lien on the property, this is an insurable interest.[1] And, generally, every bailee or party in possession of goods, with lien on them, may insure them.[2] And a lender on bottomry or respondentia, may insure the ship or goods.[3] And any persons who have possession of property, or a right to possession, and may legally make a profit out of it, as factors on commission, consignees, or carriers, may insure their interest.[4]

If a mortgagee be insured, and recovers from the insurers, he, generally at least, transfers to them the security for his debt, or accounts with them for its value; because, to the extent of that security, he has met with no loss, and if he did not transfer it, would recover his money twice.[5]

[1] Buchanan *v.* Ocean Ins. Co. 6 Cow. 318; Wolff *v.* Horncastle, 1 B. & P. 316; Tasker *v.* Scott, 6 Taunt. 234; Wells *v.* Phil. Ins. Co. 9 Serg. & R. 103.

[2] Crowley *v.* Cohen, 3 B. & Ad. 478; Van Natta *v.* Mut. Security Ins. Co. 2 Sandf. 490. In this case, the plaintiff insured the cargo of a canal boat generally. *Held*, that he might recover on proving that he had a special interest in it as a common carrier.

[3] Harman *v.* Vanhatton, 2 Vern. 717; Kenny *v.* Clarkson, 1 Johns. 385. In Williams *v.* Smith, 2 Caines, 13, it was held that the purchaser of a vessel, which had been bottomried, he not knowing it at the time of the sale, had an insurable interest in it.

[4] Putnam *v.* Mercantile Marine Ins. Co. 5 Met. 386. In this case, it was held that a commission merchant, to whom the cargo of a vessel was consigned for sale, might insure his expected commissions while the vessel was on her voyage. Mr. Justice *Hubbard*, in delivering the opinion of the court, says: "The law of insurance has been most reasonably extended to embrace within its provisions cases where the parties, having no ownership of the property, have a lien upon it, or such an interest connected with its safety and its situation, as will cause them to sustain a direct loss from its destruction, or from its not reaching its proper place of destination. Such rights have received protection, and the expectation of profits, the loan upon mortgage or respondentia, the advances of a consignee, an agent or factor, are all now the well-recognized subjects of insurance." See also French *v.* Hope Ins. Co. 16 Pick. 397; Crowley *v.* Cohen, 3 B. & Ad. 478; De Forest *v.* Fulton F. Ins. Co. 1 Hall, 84.

[5] Prior to the case of King *v.* State Mut. Fire Ins. Co. 7 Cush. 1, the commonly received opinion was, that, if the mortgagee insured his interest and recovered from the insurers, they were entitled to an assignment of an amount of the debt equal to that paid for the loss. See 2 Phillips on Ins. § 1712. In the case above referred to, *Shaw*, C. J., takes very strong grounds in favor of permitting the mortgagee to recover on both contracts. He says, on page 9: "What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received, in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent." Mr. Phillips takes a somewhat different ground, and seems to us, to view the case in its true light. He says: "If the assured could recover the amount of the debt under a policy on the property pledged as collateral security, and also the debt itself, from the debtor, the policy would be equivalent to a ticket in a lottery, for the debtor is, under such a policy, still liable for the debt, which is not discharged by payment of the loss on property mortgaged as collateral security." In Carpenter *v.* Providence Washington Ins. Co. 16 Pet. 495, 501, Mr. Justice *Story* says: "Where a

A policy usually adds to the description of the property, "lost or not lost." This phrase makes the policy retrospective; and attaches it to the property, if that existed when, by the terms of the policy, the insurance began, whether this were for a voyage or for a certain time, although it had ceased to exist when the policy was made.[1]

An interest which was originally valid and sufficient, cannot be defeated by that which threatens but does not complete an actual divestment of the interest in property; therefore, not by attachment, or on execution[2] for debt; nor by liability to seizure

mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein." See also the language of *Walworth*, Chancellor, in Etna F. Ins. Co. *v.* Tyler, 16 Wend. 385, 397. Moreover, the case of King *v.* State Mutual Fire Ins. Co. seems hardly consistent with a prior decision of the same court. It is provided by statute, in Massachusetts, that railroad corporations shall be responsible for losses by fire caused by their locomotives, "to the person or corporation injured." In Hart *v.* Western R. R. Corporation, 13 Met. 99, a house which was insured, was destroyed by a fire communicated by a locomotive engine of the defendants. The underwriters paid the owner the amount of the loss. It was held that the underwriters could then bring an action against the corporation, under the statute, in the name of the owner, and that he could not release such action. *Shaw*, C. J., says: "Now, when the owner, who *primâ facie* stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the insurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction. Where such an equity exists, the party holding the legal right, is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected." See also Mason *v.* Sainsbury, 2 Condey's Marshall, 794; Clark *v.* The Hundred of Blything, 2 B. & Cress. 254. But if the doctrine contended for in King *v.* State Mutual Fire Ins. Co., be true in fire insurance, it does not follow that it is true in marine. On the other hand, there are numerous cases in favor of the doctrine of subrogation. Thus, it has been held that, where a master of a vessel is liable, as a common carrier, to the assured for a loss, as by thieves, for which the insurer is also liable, the insurer, upon an abandonment being made, is entitled to be subrogated to the rights of the insured against the owner. Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285. See also Bell *v.* Western Mar. and Fire Ins. Co. 5 Rob. Louis. 423, 442; Russel *v.* Union Ins. Co. 4 Dall. 421; Gracie *v.* New York Ins. Co. 8 Johns. 245; Coolidge *v.* Gloucester Ins. Co. 15 Mass. 341; Walker *v.* U. S. Ins. Co. 11 S. & R. 61; Col. Ins. Co. *v.* Ashby, 4 Pet. 139.

[1] Paddock *v.* Franklin Ins. Co. 11 Pick. 229. In this case, there was an insurance on the cargo of the ship Tarquin, "lost or not lost, now on a whaling voyage." *Shaw*, C. J., says: "To construe this policy so as to make the risk commence on the day of its date, it would be necessary to limit the word 'voyage' to a very small part of the voyage, without any words expressing such limitation, and would render the words 'lost or not lost' wholly inoperative. We are of opinion that this policy would attach upon the oil from the time the vessel first began to take whales in the course of this voyage." See also Hucks *v.* Thornton, 1 Holt, N. P. 30; March *v.* Pigot, 5 Burrow, 2802. See Hammond *v.* Allen, 2 Sumn. 387, 396.

[2] See Strong *v.* Manufacturers' Ins. Co. 10 Pick. 40; Clark *v.* New Eng. Mut. F.

by government for forfeiture;[1] nor a right in the seller to stop the goods *in transitu;*[2] nor capture.[3] But sale on execution, actual seizure, stoppage *in transitu*, or condemnation, divest the property, and discharge the insurance.[4] And the insurance never attaches if the interest is illegal originally;[5] and it is discharged if it becomes illegal, subsequently to the insurance, or if an illegal use of the subject-matter of the insurance is intended.[6] And any act is illegal which is prohibited by law, or made subject to a penalty.[7] The effect would be the same if the policy opposes distinctly the principles and the purposes of law, as wagering policies do.[8]

Mariners, or mates, cannot insure their wages, but may insure goods on board, bought with their wages;[9] and one legally in-

Ins. Co. 6 Cush. 354; *ante*, p. 408, n. 1. See also Franklin Fire Ins. Co. *v.* Findlay, 6 Whart. 483.

[1] Clark *v.* Protection Ins. Co. 1 Story, 109, 131. "If the illegal act is followed by a forfeiture and seizure of the thing insured, I agree that the underwriters are not liable for the loss. But the mere fact of liability to forfeiture does not avoid the insurance, or prevent a recovery for a loss by any independent peril." Per *Story*, J. See also The Ocean Ins. Co. *v.* Polleys, 13 Pet. 157; The Mars, 1 Gallison, 192.

[2] Stoppage *in transitu* proceeds upon the ground of an equitable lien, not of rescinding the contract. Gwynne, *ex parte*, 12 Ves. Jr. 379; per *Shaw*, C. J., Rowley *v.* Bigelow, 12 Pick. 313; Stanton *v.* Eager, 16 Pick. 475. The vendee, or his assignees, may recover the goods, on payment of the price, and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment. If he has been paid in part, he may stop the goods for the balance due him, and the part-payment only diminishes the lien *pro tanto* on the goods detained. Newhall *v.* Vargas, 13 Maine, 93; Kymer *v.* Suwercropp, 1 Camp. 109. See also 1 Parsons on Cont. 479.

[3] Per Lord *Eldon*, Lucena *v.* Crauford, 5 Bos. & Pul. 319; East India Co. *v.* Sands, cited in 10 Mod. 79.

[4] See *ante*, four preceding notes.

[5] See *ante*, p. 409, notes 2 and 4.

[6] Russell *v.* Degrand, 15 Mass. 35. The insurance in this case was from Boston to the port of discharge in Europe. In the policy, it was provided that no exceptions were to be taken on account of ports interdicted by the laws of the United States. At the time the policy was made, a statute was in force prohibiting all vessels from going to any port in France or England. There was evidence tending to show that, at the time the policy was made, it was intended that the vessel should go to France, and that she afterwards sailed for, and arrived there. *Held*, that the contract was illegal, and therefore void.

[7] Farmer *v.* Legg, 7 Term, 186; Ingham *v.* Agnew, 15 East, 517; Wainhouse *v.* Cowie, 4 Taunt. 178; United States *v.* The Paul Shearman, 1 Pet. C. C. 98; Bartlett *v.* Vinor, Carth. 252. Per *Holt*, C. J.: "Every contract made for, or about any matter or thing, which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." This is cited with commendation by *Tindal*, C. J., in De Begnis *v.* Armistead, 10 Bing. 107; Gallini *v.* Laborie, 5 Term, 242; Clark *v.* Protection Ins. Co. 1 Story, 109, 122.

[8] See *ante*, p. 409, n. 2.

[9] Emerigon, (by Meredith,) 191; Lucena *v.* Craufurd, 5 B. & P. 294. "But the mariner is not permitted to insure his wages by the policy of our law, in order that he may be stimulated to all possible exertion for the preservation of the ship, on which

terested in the wages of a mariner, may insure them.[1] A master may insure his wages, commissions, or any profit he may make out of his privilege.[2]

An unexecuted intention, if not distinctly agreed upon, will not defeat a policy;[3] nor a remote and incidental illegality; as smuggling stores on board,[4] or not having on board the provisions required by law;[5] nor a change from legality to illegality, which cannot be proved or supposed to be known to the insured.[6] And upon these questions, the court, if the case be balanced, will incline to the side of legality.[7] A cargo may be insured which is itself lawful, but was purchased with the proceeds of an illegal voyage.[8]

If a severable part of a cargo or a voyage is legal, it may be insured, although other parts are illegal. But if a part of the whole property insured is illegal, this avoids the whole policy.[9]

A compliance with foreign registry laws certainly is not, and with our own, probably, is not necessary to sustain the insurance of an actual owner in good faith.[10]

alone all his own interests are made to depend." Per Lord *Stowell*, in the case of The Juliana, 2 Dodson, 509. But if they engage to go on a long voyage, and covenant to have some money paid them abroad, to lay out in goods to bring home, insurance may be made on such goods. Weskett on Ins. 587. See also Webster *v.* De Tastet, 7 Term, 157; Galloway *v.* Morris, 3 Yeates, 445; M'Quirk *v.* The Penelope, 2 Peters's Adm. 276; Icard *v.* Goold, 11 Johns. 279; Percival *v.* Hickey, 18 Johns. 257.

[1] Hancox *v.* Fishing Ins. Co. 3 Sumn. 141.

[2] King *v.* Glover, 5 Bos. & Pul. 206. In this case, the captain insured his commissions, privileges, &c.; his wages were not insured; but the court seemed to consider it as well settled that a captain might insure his wages. See also Foster *v.* Hoyt, 2 Johns. Cas. 327; Holbrook *v.* Brown, 2 Mass. 280.

[3] "A mere intention to do an illegal act, or other act, which would avoid a policy, if done, but which has never been consummated by any act, has never, as far as I know, been deemed, *per se*, to vitiate the policy." Per *Story*, J., Clark *v.* Protection Ins. Co. 1 Story, 124. See also The Abby, 5 Chr. Robinson, 251; Waters *v.* Allen, 5 Hill, 421.

[4] Ocean Ins. Co. *v.* Polleys, 13 Pet. 157; Clark *v.* Protection Ins. Co. 1 Story, 109.

[5] Deshon *v.* Merchants' Ins. Co. 11 Met. 199.

[6] Walden *v.* Phœnix Ins. Co. 5 Johns. 310.

[7] See cases *passim*.

[8] Per Lord Kenyon, C. J., Bird *v.* Appleton, 8 Term, 562.

[9] See 2 Parsons on Contracts, 29, as to when a contract is entire. See also Camden *v.* Anderson, 6 Term, 723. In Parkin *v.* Dick, 11 East, 502, Lord *Ellenborough* said: "It has been decided a hundred times that, if a party insures goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void." Keir *v.* Andrade, 6 Taunt. 498. This was an action on a policy of insurance upon goods valued at £5,000, from London to Madeira. The plaintiff had placed on board the vessel 300 barrels of gunpowder, which were forbidden to be exported. They obtained a license for 150 of the barrels. The court held that they could recover for the loss of the 150, but not for the rest. See also Butler *v.* Allnutt, 1 Starkie, 222; Clark *v.* Protection Ins. Co. 1 Story, 128.

[10] The cases of Camden *v.* Anderson, 6 Term, 723, and Marsh *v.* Robinson, 4 Esp. 98, were decided under the Registry Act of 26 Geo. 3, c. 60, § 3, which provides that

By the law of nations, goods, contraband of war, are forfeited if captured by a belligerent against whom they might be used.[1] Goods are contraband, which are munitions of war, or are designed or capable of supporting an enemy in carrying on war,[2] — as even food, if sent to a place which it is sought to

all unregistered transfers of property in a ship, shall be "utterly null and void to all intents and purposes." It was consequently decided in those cases, that none but the parties on record had an insurable interest in the freight. In Ocean Ins. Co. *v.* Polleys, 13 Pet. 157, it was held that an insurance was valid upon a ship sailing under circumstances rendering her liable to forfeiture for a violation of the registry laws of the United States. It has been generally held in this country, that the insured need not state his interest at the time of making the insurance, unless it is asked for. Locke *v.* North American Ins. Co. 13 Mass. 61. The case of Bixby *v.* Franklin Ins. Co. 8 Pick. 86, was as follows. The policy was made in the names of Bixby, Valentine and Co., and Hibbert, the master. This firm consisted of Bixby, Valentine, and Holmes. Before this partnership was formed, the brig was owned by Holmes and Hibbert, in whose names she continued to be registered at the custom-house, until the loss occurred. The court held that, Holmes having sold out a portion of his half, and the partnership being formed, the transfer on the books of the firm was, between Holmes and his partners, a sufficient transfer, and that the fact of the vessel not being transferred on the custom-house register, could not affect the question, unless the sale should be contested by a creditor of Holmes. Vinal *v.* Burrill, 16 Pick. 401, is to the same effect. The Registry Act of 1850, c. 27, provides merely, "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel shall be valid against any person other than the grantor, mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled." There seems to be no reason why an owner, though the transfer to him were not registered, should not be able to insure his interest, notwithstanding the provisions of the statute. Would it be argued that a purchaser of real estate could not insure a house because his deed was not recorded? Under the statute of 3 & 4 Will. 4, c. 55, it has been held that a mortgage is good between the parties, though the particulars thereof were not indorsed. Lyster *v.* Payn, 11 Sim. 348.

[1] Richardson *v.* Maine Ins. Co. 6 Mass. 114. "An insurer is not answerable for a seizure and confiscation of goods for the violation of the trade laws of a foreign port, unless, with a full knowledge of the trade, or by an express undertaking, he shall insure them against such seizure." In the case of The Haabet, 2 Rob. 174, Sir Wm. *Scott* says: "The right of taking possession of cargoes of this description, *commeatus* or provisions going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations."

[2] The following articles are considered contraband. Ships of war destined to an enemy's port, to be there sold. The Richmond, 5 Rob. 331. Sail cloth, under all circumstances. The Neptunus, 3 Robinson, 108. Pitch and tar, which are not the produce of the country exporting. The Twee Juffrowen, 4 Rob. 242; The Jonge Tobias, 1 Rob. 329. But it has been held that pitch and tar being Swedish property, and conveyed in Swedish vessels, are not subject to confiscation, but simply to the rights of preoccupancy and preëmption. The Maria, 1 Rob. 372; The Christina Maria, 4 Rob. 166; The Sarah Christina, 1 Rob. 241. See also The Charlotte, 1 Act. 201, and The Neptunus, 6 Rob. 403. Hemp, which is not fit for naval purposes, (The Gute Gesellschaft Michael, 4 Rob. 94,) or which is the produce of the exporting country, and embarked in its vessels, (The Apollo, 4 Rob. 158,) is not considered contraband, but the *onus probandi* lies with the claimant. The Evert, 4 Rob. 354. Rosin is contraband if destined for a military port of the enemy. The Nostra Signora De Begona, 5 Rob. 97. Brimstone, under some circumstances, will be considered contraband. The Ship Carpenter, 2 Act. 11. Tallow, if destined to a port merely of naval equipment, will be deemed contraband, but not if the port possess also an extensive trade and mercantile character. The Neptunus, 6 Rob. 403. Timber, for ship building, also masts, if going to an enemy's port of naval equipment, become contraband. The Staadt Embden, 1 Rob. 29; The Endraught, 1 Rob. 25; The Twende Brodre, 4 Rob. 33.

reduce by starvation;[1] and so are any goods sent to a blockaded port.[2] No contraband trade is, strictly speaking, illegal, in the neutral country which carries it on; that is, the courts of that country will not declare it illegal, or annul contracts which have this trade in view, for illegality.[3] But if the owners of a ship contemplate contraband trade, either in the place they send her to, or in the goods they put on board, this is an additional risk, which must be communicated to the insurers, or the policy is void.[4]

Freight is a common subject of insurance. In common conversation, this word means sometimes the cargo carried, and sometimes the earnings of the ship by carrying the cargo. The latter is the meaning in mercantile law, and especially in the law of insurance.[5] It includes the money to be paid to the owner of a ship by the shipper of goods, and the earnings of an owner by carrying his own goods, and the amount to be paid to him by the hirer of his ship, and the profits of such hirer, either by carrying his own goods, or by carrying, for pay, the goods of others.[6]

An interest in freight begins as soon as the voyage is determined upon, and the ship is actually ready for sea, and goods are on board, or are ready to be put on board, or are promised to be on board by a contract binding on the owner of the goods.[7]

If a ship is insured on a voyage which is to consist of many passages, and sail without cargo, but a cargo is ready for her, or contracted for her at the first port she is to reach and sail from,

[1] The Jonge Margaretha, 1 Rob. 189. In this case, the law of contraband is most ably laid down by Sir Wm. Scott. In The Edward, 4 Rob. 68, wines taken to a naval port of the enemy, at the time a large fleet were there, were adjudged contraband. So cheeses, of the kind usually furnished as naval stores, were, under similar circumstances, condemned. The Zelden Rust, 6 Rob. 93.

[2] To justify a condemnation for a breach of blockade, three things must be proved. First, the existence of an actual blockade; second, the knowledge of the party; third, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade. Per Sir *Wm. Scott*, in the case of The Betsey, 1 Rob. 93. See also The Ostee, decided in the Judicial Committee of the Privy Council, March 29, 1855, reported in The Law Reporter, for September, 1855, p. 262.

[3] Gardiner *v.* Smith, 1 Johns. Cas. 141; Christie *v.* Secretan, 8 Term, 197, per *Lawrence*, J.

[4] See *ante*, p. 409, n. 4. Pond *v.* Smith, 4 Conn. 297.

[5] Robinson *v.* Manufacturers' Ins. Co. 1 Met. 145, per *Shaw*, C. J.; Adams *v.* Penn. Ins. Co. 1 Rawle, 97, 106.

[6] Clark *v.* Ocean Ins. Co. 16 Pick. 289.

[7] Truscott *v.* Christie, 2 Brod. & Bing. 320; Thompson *v.* Taylor, 6 Term, 478; Mackenzie *v.* Shedden, 2 Camp. 431; De Vaux *v.* J'Anson, 5 Bing. N. C. 519; Forbes *v.* Aspinall, 13 East, 323. But where the parties have expressly stipulated that the risk is to commence when the goods are laden on board, a cargo engaged, but not laden, will not be covered. Gordon *v.* Am. Ins. Co. of N. Y. 4 Denio, 360.

the owner has an insurable interest in the freight from the day on which he sails from his home port.[1]

If one makes advances towards the freight he is to pay, and this is to be repaid to him by the ship-owner, if the freight is not earned, the advancer has no insurable interest in what he advances;[2] but if he is to lose it, without repayment, if the ship be lost or the freight not earned, he has an insurable interest.[3]

SECTION IV.

OF PRIOR INSURANCE.

Our marine policies generally provide for this by a clause, to the effect, that the insurers shall be liable only for so much of the property as a prior insurance shall not cover. The second covers what the first leaves, the third what the second leaves, and so on; and as soon as the whole value of the property is covered, the remainder of that policy, and the subsequent policies, have no effect.[4] This priority relates not merely to the date of the instrument, but to the actual time of insurance.[5] Sometimes the policy provides that the insured shall recover only the same proportion of the whole loss which the amount insured in that policy is of the whole amount insured by all the policies on the whole property.[6]

When a prior policy is deducted, from this deduction is taken the amount of the premium paid for the insurance.[7]

It sometimes happens that the property is increased in value, or in the valuation, after the first insurance is effected; but in settling with a second, only the actual amount covered by the first is deducted.[8]

[1] Flint *v.* Flemyng, 1 Barn. & Ad. 45; Forbes *v.* Aspinall, 13 East, 323; Hart *v.* Delaware Ins. Co. 2 Wash. C. C. 346; De Longuemere *v.* Phœnix Ins. Co. 10 Johns. 127; Adams *v.* Penn. Ins. Co. 1 Rawle, 97, 106.

[2] De Silvale *v.* Kendall, 4 M. & S. 37; Manfield *v.* Maitland, 4 B. & Ald. 585; Wilson *v.* Royal Exch. Ass. Co. 2 Camp. 626.

[3] Manfield *v.* Maitland, 4 B. & Ald. 582; Robbins *v.* N. Y. Ins. Co. 1 Hall, 325.

[4] Perkins *v.* N. E. Mar. Ins. Co. 12 Mass. 214; Col. Ins. Co. *v.* Lynch, 11 Johns. 233.

[5] Lee *v.* Mass. F. & M. Ins. Co. 6 Mass. 208.

[6] Lucas *v.* Jefferson Ins. Co. 6 Cowen, 635; Howard Ins. Co. of N. Y. *v.* Scribner, 5 Hill, 298.

[7] 2 Phillips, Ins. § 1257.

[8] Murray *v.* Ins. Co. of Penn. 2 Wash. C. C, 186; M'Kim *v.* Phœnix Ins. Co. 2 Wash. C. C. 89.

A subsequent policy may be suspended by the fact that prior policies cover all the property, and when any of these prior policies is exhausted, the next policy begins to take effect.[1]

If all once attach, and afterwards the property is diminished, we should prefer the rule that all the policies should be diminished *pro rata*. It has been held, however, that the rule as to prior policies operates, and the last policy is discharged or lessened by the whole amount of the diminution.[2]

Where no provision is made in the policies as to priority, all are insurers alike, but all together only of the whole value at risk. The insured, therefore, may recover of any one insurer at his election, and this insurer may compel the others to contribute to him in proportion to their respective insurances.[3]

Insurances may be simultaneous, and then no clause as to prior policies has any application, and all the insurances are liable *pro rata*.[4] They are simultaneous, if said to be so in the policies; or, if made on the same day, and bearing the same date, and there is no evidence as to which was, in fact, first made.[5]

SECTION V.

OF DOUBLE INSURANCE AND REINSURANCE.

If there be double insurance, either simultaneously or by successive policies in which priority of insurance is not provided for, we have seen that all are insurers, and liable *pro rata*.[6]

But there is no double insurance, unless all the policies insure the very same subject-matter, and, taken together, exceed its whole value.[7] Nor is there double insurance as to any particular

[1] Kent *v.* Manufacturers' Ins. Co. 18 Pick. 19.

[2] Am. Ins. Co. *v.* Griswold, 14 Wend. 399. See also the dissenting opinion of Mr. Senator Tracy, p. 502; 2 Phillips on Ins. § 1261.

[3] Lucas *v.* Jefferson Ins. Co. 6 Cowen, 635; Fisk *v.* Masterman, 8 M. & W. 165; Craig *v.* Murgatroyd, 4 Yeates, 161; Millaudon *v.* Western Mar. & Fire Ins. Co. 9 Louis. 27; Thurston *v.* Koch, 4 Dall. 348.

[4] Potter *v.* Marine Ins. Co. 2 Mason, 475; Wiggin *v.* Suffolk Ins. Co. 18 Pick. 145.

[5] Though both bear date the same day, parol evidence is admissible, to show which was made first. Potter *v.* Marine Ins. Co. *ut. cit. sup.*

[6] See *supra*, n. 4.

[7] Perkins *v.* N. Eng. Mar. Ins. Co. 12 Mass. 214; Columbian Ins. Co. *v.* Lynch, 11 Johns. 233; Warder *v.* Horton, 4 Binn. 529; Howard Ins. Co. *v.* Scribner, 5 Hill, 298.

one of these policies, unless the whole amount insured by all exceed the value that is insured by that policy.[1] So, if the whole amount insured exceeds the valuation of the subject-matter as it stands in any one policy, it is said that there is over insurance as to that.[2]

Many insurances of the same subject-matter, for the benefit of different parties, do not constitute double insurance.[3]

Reinsurance is lawful; for whoever insures another, has assured a risk against which he may cause himself to be insured. This is often done by companies who wish to close their accounts, to lessen their risks, or get rid of some especial risk.[4]

SECTION VI.

OF THE MEMORANDUM.

This word is retained, because the English policies have attached to them a note or memorandum providing that the insurers shall not be liable for any loss upon certain articles therein enumerated, (and thence called memorandum articles,) unless it be total, or greater than a certain percentage. In our policies, the same thing is provided for, but usually by a clause contained in the body of the policy. The general purpose is to guard against a liability for injuries which may very probably not arise from maritime peril, because the articles are in themselves perishable; but which injuries it might not be easy to refer to the precise causes which produced them.[5]

[1] Kane *v.* Comm. Ins. Co. 8 Johns. 229; Minturn *v.* Columbian Ins. Co. 10 Johns. 75; Pleasants *v.* Maryland Ins. Co. 8 Cranch, 55; Murray *v.* Ins. Co. of Penn. 2 Wash. C. C, 186.

[2] Bousfield *v.* Barnes, 4 Camp. 228. See, however, 1 Phillips on Ins. § 370.

[3] Warder *v.* Horton, 1 Binn. 529; Godin *v.* London Ass. Co. 1 Burr, 489.

[4] See *ante*, p. 412, n. 7.

[5] The law of England and of this country differs essentially in regard to memorandum articles. The law here is, that if the goods arrive in specie at the port of destination, though utterly worthless, the underwriters are not liable. The rule is founded on the case of Cocking *v.* Frazer, Park on Ins. 247. In which case Lord *Mansfield* used the following language: "The fish may all come to port, though from the nature of the commodity it may be damaged—it may be stinking—still, as it specifically remains, the underwriter is discharged." This doctrine is shaken in England by the cases of Burnett *v.* Kensington, 7 Term, 210; Dyson *v.* Rowcroft, 3 Bos. & Pul. 474; Cologan *v.* London Ass. Co. 5 M. & S. 447. The remarks of *Platt*, B., in Montoya *v.* London Ass. Co. 4 Eng. Law & Eq. 503, show also that in England the goods must be of value on arrival. The leading American cases sustaining Cocking *v.* Frazer, are Neilson *v.* Col. Ins. Co. 3 Caines, 108; Morean *v.* U. S. Ins. Co. 1 Wheat. 219;

The articles and the percentage vary very much at different times and in different States. Perhaps as good a list of them for practical purposes as can be found anywhere, is given in 1 Phillips on Insurance, (3d ed.) note to fifty-fourth section.

SECTION VII.

OF WARRANTIES.

A stipulation or agreement *in the policy*, that a certain thing shall be or not be, is a warranty. And every warranty must be, if not strictly, at least accurately complied with. Nor is it an excuse that the thing is not material;[1] or that the breach was not intended, or not known; or that it was caused by an agent of the insured.[2] A warranty is equally effectual if written upon a separate paper, but referred to in the policy itself as a warranty.[3] And the direct assertion or allegation of a fact may constitute a warranty.[4]

Saltus *v.* Ocean Ins. Co. 14 Johns. 138; Williams *v.* Kennebec Ins. Co. 31 Maine, 455; Robinson *v.* Commonwealth Ins. Co. 3 Sumner, 224; Hugg *v.* Augusta Ins. & Banking Co. 7 Howard, 595. A more difficult question arises where the voyage is temporarily broken up at an intermediate port. In Reimer *v.* Ringrose, 4 Eng. L. & Eq. 388, it was held, that there was no total loss, unless the value of the goods, on arrival, would be less than the expenses of bringing them on. In Rosetto *v.* Gurney, 7 Eng. L. & Eq. 461, this rule was held to be incorrect, and the one adopted that the goods, on arrival, must be of sufficient value to pay all the expenses at the intermediate port, and the advanced freight, if any, for sending them on. The rule in this country is, that there is a total loss at an intermediate port, first, when neither the original ship nor any other can be procured to take on the goods "in their then damaged state;" second, when the goods are in such a state, by reason of a peril insured against, that the health and safety of the crew would be endangered by carrying them on. Besides the authorities above cited, the following cases are in point. Marcardier *v.* The Chesapeake Ins. Co. 8 Cranch, 39; Poole *v.* Protection Ins. Co. 14 Conn. 58; Ogden *v.* Gen. Mut. Ins. Co. 2 Duer, N. Y. Rep. 219. If, at the intermediate port, by the exercise of reasonable care and diligence, the master can put the goods in a condition to be sent on, it is incumbent on him to do so. Williams *v.* Kennebec Ins. Co. 31 Maine, 455; Navone *v.* Haddon, 9 Common Bench, 30; Lord *v.* Neptune Ins. Co. decided by the Supreme Court of Massachusetts, March term, 1854—not yet reported. See *post*, p. 475, n. 1.

[1] Newcastle F. Ins. Co. *v.* Macmorran, 3 Dow, 262; Blackhurst *v.* Cockell, 3 Term, 360, per *Buller*, J.

[2] The only question is, "Is the warranty broken?" Duncan *v.* Sun Fire Ins. Co. 6 Wend. 488.

[3] Routledge *v.* Burrell, 1 H. B. 254; Worsley *v.* Wood, 6 Term, 710. See also Bean *v.* Stupart, Doug. 11; Jennings *v.* Chenango Co. Mut. Ins. Co. 2 Den. 75; Glendale Manuf. Co. *v.* Protection Ins. Co. 21 Conn. 19; Williams *v.* N. Eng. Mut. Ins. Co. 31 Maine, 219; Burritt *v.* Saratoga County M. F. Ins. Co. 5 Hill, 188.

[4] Where insurance was made on property described to be on board the "Swedish brig Sophia," it was held to be a warranty that the brig was Swedish. Lewis *v.* Thatcher, 15 Mass. 433; Barker *v.* Phœnix Ins. Co. 8 Johns. 307. If the description

If the breach exists at the commencement of the risk, it avoids the whole policy, although the warranty was complied with before a loss;[1] and although all other risks were distinct from that to which the warranty related; and even if the breach was caused by one of the risks against which there was insurance.[2]

If the breach occur after the risk begins, and before a loss, and is not caused or continued by the fault of the insured, the insurers are held;[3] as they are if a compliance with the warranty becomes illegal after the policy attaches, and it is therefore broken.[4]

The usual subjects of express warranty are: first, the ownership of the property, which is chiefly important as it secures the neutrality, or freedom from war risks of the property insured. The neutrality is sometimes expressly warranted; and this warranty is not broken, if a part of the cargo that is not insured is belligerent.[5] But it is broken if a neutral has the legal title, but only in trust for a belligerent.[6] The neutrality of the ship and of the cargo must be proved by the ship's having on board all the usual and regular documents.[7] False papers may, however, be carried for commercial purposes, either when leave is given by the insurers, or when it is permitted by a positive and established usage.[8]

If neutrality is warranted, it must be maintained by a strict adherence to all the rules and usages of a neutral trade or employment.[9] Without warranty, every neutral ship is bound to respect a blockade which legally exists by reason of the presence

is merely collateral, it will not amount to a warranty. Martin *v.* Fishing Ins. Co. 20 Pick. 389; Mackie *v.* Pleasants, 2 Binn. 363.

[1] Rich *v.* Parker, 7 Term, 705.

[2] Hore *v.* Whitmore, Cowp. 784. See also 1 Phillips on Ins. 770; 1 Arnold on Ins. 584.

[3] Am. Ins. Co. *v.* Ogden, 15 Wend. 532. In this case it was held, that if a vessel was seaworthy at the commencement of the voyage, the risk attached; but if she afterwards became unseaworthy, and a loss happened, which could not be attributed to her unseaworthiness, the underwriters would be held responsible. See also Copeland *v.* New England Marine Ins. Co. 2 Met. 432.

[4] Brewster *v.* Kitchell, 1 Salk. 198.

[5] Livingston *v.* Maryland Ins. Co. 6 Cranch, 274.

[6] Goold *v.* United Ins. Co. 2 Caines, 73; Calbreath *v.* Gracy, 1 Wash. C. C. 219; Bayard *v.* Mass. F. & M. Ins. Co. 4 Mason, 256.

[7] Coolidge *v.* N. Y. Firem. Ins. Co. 14 Johns. 308; Higgins *v.* Livermore, 14 Mass. 106; Barker *v.* Phœnix Ins. Co. 8 Johns. 307; The San Jose, 2 Gall. 285; The Vigilantia, 1 Chr. Rob. 11; Sleght *v.* Hartshorn, 2 Johns. 531; Griffith *v.* Ins. Co. of N. A. 5 Bin. 464; Carrère *v.* Union Ins. Co. 3 Harris & Johns. 324.

[8] Livingston *v.* Maryl. Ins. Co. 7 Cranch, 506; Calbreath *v.* Gracy, 1 Wash. C. C. 219. See also Horneyer *v.* Lushington, 15 East, 46; Bell *v.* Bromfield, 15 East, 364.

[9] The Princessa, 2 Rob. 52.

of an armed force sufficient to preserve it, and of which the neutral has knowledge.[1]

The second most common express warranty, is that of the time of the ship's sailing. She sails when she weighs anchor or casts off her fastenings, and gets under way—if she be then ready for sea and intended for sea — although stopped immediately after, or driven back.[2] But however ready and intended, if she is stopped before she gets under way, this is a breach of the warranty of sailing.[3] Nor is it complied with by leaving a place to return to it immediately;[4] or by going from one port of the coast or island to another.[5] If the ship is warranted "in such a harbor or port," or "where the ship now is," this means at the time of the insurance.[6] And "warranted in port" means the port of insurance, unless another port is expressed or distinctly indicated.[7]

SECTION VIII.

OF IMPLIED WARRANTIES.

The most important of these warranties, — which the law makes for the parties, although they may, if they please, make them for themselves, — is that of *seaworthiness.* By this is meant, that every person who asks to be insured upon his ship, by the mere force and operation of law, warrants that she is, in every respect — of hull, sails, rigging, officers, crew, provisions, implements, papers, and the like — competent to enter upon and

[1] See *ante*, p. 418, n. 2. See also The Arthur, 1 Dods. 423; The Ocean, 5 Rob. 91; The Vrouw Judith, 1 Rob. 152; The Neptunus, 2 Rob. 110; Dalgleish *v.* Hodgson, 7 Bing. 495; The Vrow Johanna, 2 Rob. 109; The Dispatch, 1 Act. 163; The Alexander, 4 Rob. 93; The Fortuna, 5 Rob. 27; The Christiansberg, 6 Rob. 378; The Adonis, 5 Rob. 256; The Hoffnung, 6 Rob. 116.

[2] Thellusson *v.* Staples, 1 Doug. 366, note; Cockrane *v.* Fisher, 2 Cr. & Mee. 581; Bond *v.* Nutt, Cowp. 601; Bowen *v.* Hope Ins. Co. 20 Pick. 275.

[3] On this point the authorities are somewhat conflicting. See Lang *v.* Anderdon, 3 B. & C. 495; Bond *v.* Nutt, Cowper, 601; Earle *v.* Harris, Douglas, 357; Thellusson *v.* Fergusson, 1 Doug. 361; Nelson *v.* Salvador, 1 Mood. & Mal. 309. The distinction between the cases seems to be this:—If the risk is to commence only at the sailing, then the vessel must actually sail. But if the risk had begun previously, and the vessel was ready to sail at the time, but was prevented by a peril insured against, the warranty to sail is complied with.

[4] Cockrane *v.* Fisher, 2 Cr. & Mees. 581.

[5] Wright *v.* Shiffner, 11 East, 515; Dennis *v.* Ludlow, 2 Caines, 111; Risdale *v.* Newnham, 3 M. & S. 456.

[6] Callaghan *v.* Atlantic Ins. Co. 1 Edw. Chan. 64.

[7] Colby *v.* Hunter, 3 C. & P. 7; Keyser *v.* Scott, 4 Taunt. 660; Dalgleish *v.* Brooke, 15 East, 295.

prosecute that voyage at the time proposed, and encounter safely the common dangers of the sea.[1] If this warranty be not complied with, the policy does not attach, whether the breach be known or not, unless there is some peculiar clause in the policy waiving this objection.[2]

If the ship be seaworthy and the policy attaches, no subsequent breach discharges the insurers from their liability for a loss previous to the breach.[3] Even if it does not attach at the beginning of the voyage, if the unseaworthiness be capable of prompt and effectual remedy, and be soon and entirely remedied, the policy may then attach. Especially if it could be considered as attaching in the port, and then as suspended only by the sailing in unseaworthy condition, and then reviving, or reattaching, on repair.[4] The true rule should be, that if unseaworthiness prevents the policy from attaching at the proper commencement of the *risk*, the contract becomes a nullity.[5]

If she becomes unseaworthy in the course of the voyage, from a peril insufficient to produce it in a sound vessel, this may be evidence of inherent weakness and original unseaworthiness.[6] But if originally seaworthy, and by any accident made otherwise, the policy continues to attach until she can be restored to a seaworthy condition by reasonable endeavors. And the general rule is that she must be so restored as soon as she can be. It is the duty of the master to repair her as soon as he can; by the aid of another ship if that may be, but otherwise not to keep her at sea if she can readily make a port where she can be made seaworthy; and not to leave that port until she is seaworthy.[7] The

[1] Dixon *v.* Sadler, 5 M. & W. 405, 414, per *Parke*, B.

[2] Small *v.* Gibson, 3 Eng. L. & Eq., 305; Tidmarsh *v.* Washington F. & M. Ins. Co. 4 Mason, 441; Copeland *v.* New Eng. Mar. Ins. Co. 2 Metc. 437.

[3] After the risk has once commenced, the underwriters are liable for all losses which are not the consequence of a subsequent breach of the implied warranty. Am. Ins. Co. *v.* Ogden, 20 Wend. 287; Copeland *v.* N. E. Mar. Ins. Co. 2 Metc. 432.

[4] See Taylor *v.* Lowell, 3 Mass. 331, confirmed in Merch. Ins. Co. *v.* Clapp, 11 Pick. 56. See, also, Weir *v.* Aberdein, 2 B. & Ald. 320; Garrigues *v.* Coxe, 1 Binn. 592; M'Millan *v.* Union Ins. Co. Rice (S. Car.) 248.

[5] Copeland *v.* N. E. M. Ins. Co. 2 Metc. 437.

[6] Paddock *v.* Franklin Ins. Co. 11 Pick. 227, 237. In this case *Shaw*, C. J., says: "But where the proof shows in point of fact, that the vessel sprung a leak by the starting of a butt or other internal defect, without any accident or stress of weather, but by the ordinary pressure of the cargo, and the action of the wind and sea, the ordinary presumption of seaworthiness is rebutted." See, also, Talcot *v.* Com. Ins. Co. 2 Johns. 124; Mills *v.* Roebuck, Marshall on Ins. 161; Bullard *v.* Roger Williams Ins. Co. 1 Curtis, 148; Cort *v.* Del. Ins. Co. 2 Wash. C. C. 375.

[7] Paddock *v.* Franklin Ins. Co. 11 Pick. 227. "It would seem to be more consistent

neglect of the master would not generally discharge the insurers,[1] but it is the rule that a ship must not leave a port in an unseaworthy condition, if she could there be made seaworthy; if she does, the insurers are no longer held. But their liability may be not destroyed but only suspended, if the seaworthiness be cured at the next port, especially if that be not a distant port.[2] For a loss happening while their liability is suspended, they are not liable, whether the loss was occasioned by that unseaworthiness or not.[3]

There cannot possibly be a definite and universal standard for seaworthiness. The ship must be fit for her voyage or for her place. But a coasting schooner needs one kind of fitness, a freighting ship to Europe another, a whaling ship another, a ship insured only while in port another. So as to the crew, or provisions, or papers, or a pilot, or certain furniture, as a chronometer or the like; or the kind of rigging or sails. In all these respects, much depends upon the existing and established usage. There is, perhaps, no better test than this; the ship must have all those things, and in such quantity and of such quality as the law requires, provided there is any positive rule of law affecting them; and otherwise such as would be deemed requisite according to the common consent and usage of persons engaged in

with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold that after the policy has once attached, the implied warranty should be so construed, as to exempt the underwriter from all loss or damage, which did or might proceed from any cause thus warranted against; but to hold him still responsible for those losses which by no possibility could be occasioned by peril increased or affected by the breach of such implied warranty." See, also, Copeland *v.* New Eng. M. Ins. Co. 2 Metc. 432; Am. Ins. Co. *v.* Ogden, 15 Wend. 532; S. C. 20 Wend. 287; Putnam *v.* Wood, 3 Mass. 481; Hazard *v.* New Eng. Mar. Ins. Co. 1 Sumn. 218.

[1] The question how far the owners are responsible for the gross negligence of the master, so as to exonerate the insurers, has given rise to considerable discussion. The English Court of Exchequer, in the case of Dixon *v.* Sadler, 5 M. & W. 415, decided that if a master threw over ballast, so that the vessel became unseaworthy, the underwriters were not discharged. See, also, Shore *v.* Bentall, 7 B. & C. 798, n.; Paddock *v.* The Franklin Ins. Co. 11 Pick. 227; American Ins. Co. *v.* Ogden, 20 Wend. 287; Hazard *v.* N. E. Mar. Ins. Co. 1 Sumn. 218; Copeland *v.* N. E. Mar. Ins. Co. 2 Metc. 432. In this last case, *Shaw*, C. J., after an elaborate review of the authorities, says: "No case has gone the length of deciding, that where there is a long voyage, consisting of several stages, or where there is a policy on time, which may last several years, if the vessel becomes damaged and unfit for navigation, it is not the duty of the owner to make the necessary repairs, to fit her for the service on which she is destined, and in case of failure to do so, and a loss happens from that cause, that the insurers are liable, as for a loss by one of the perils insured against. Nor, we think, has any case decided that, in the absence of proof of any other provision for the performance of this duty, the captain shall not be presumed to be the agent of the owner for this purpose. If so, we think the English and American cases can be reconciled."

[2] Paddock *v.* Franklin Ins. Co. 11 Pick. 227; Starbuck *v.* New Eng. Mar. Ins. Co. 19 Pick. 198; Am. Ins. Co. *v.* Ogden, 15 Wend. 532; S. C. 20 Wend. 287.

[3] See Taylor *v.* Lowell, 3 Mass. 331.

that trade. And the reason for this rule is, that this is exactly what the insurers have a right to expect, and if the insured intend any thing less, or the insurers desire any thing more, it should be the subject of special bargain.[1]

If a policy be intended to attach when a ship is at sea, — as, for example, upon a whaler that has been out a year or more, — we should say the same principle would apply, and ought to be sufficient as a rule of law, although it might sometimes involve difficult questions of facts. That is, we think the ship must be seaworthy in that sense and in that way, in which a ship of her declared age, size, employment and character, after being at sea at that time under ordinary circumstances, ought to be in, and may be expected to be in, by all concerned.[2] It seems to be admitted that the standard of seaworthiness is to be found from the usage and understanding of merchants, at the place where the ship belongs, and not at that where the ship is insured.[3]

If the question arises on a time-policy, whether a ship must be at the beginning seaworthy, and in such condition that she will remain so unless some accident intervene during the whole

[1] Paddock *v.* Franklin Ins. Co. 11 Pick. 227; Wedderburn *v.* Bell, 1 Camp. 1; Woolf *v.* Claggett, 3 Esp. 257; Chase *v.* Eagle Ins. Co. 5 Pick. 51; Deblois *v.* Ocean Ins. Co. 16 Pick. 303; Clifford *v.* Hunter, 3 C. & P. 16; Treadwell *v.* Un. Ins. Co. 6 Cowen, 270; Law *v.* Hollingsworth, 7 Term, 160; Tidmarsh *v.* Washington F. & M. Ins. Co. 4 Mason, 439; Bullard *v.* Roger Williams Ins. Co. 1 Curtis, 148; Small *v.* Gibson, 3 Eng. L. & Eq. 299; M'Lanahan *v.* Universal Ins. Co. 1 Peters, 170.

[2] In Paddock *v.* Franklin Ins. Co. 11 Pick. 227, the insurance was on the cargo of the ship Tarquin, "lost or not lost, now on a whaling voyage in the Pacific Ocean." The vessel had been out over three years when the policy was effected. The court held that the policy related back to the commencement of the voyage, and if the ship was then seaworthy, the policy attached. But *Shaw*, C. J., goes on to consider the case in point. He says it may be a matter of doubt whether the rule of seaworthiness as a condition precedent, would apply, when the policy was to take effect on a particular day in the latter part of a long whaling voyage in distant seas, and intended to cover only the latter portion of such a voyage. He also says, that though the rule would be probably applied, yet it would be with great liberality of construction, and what would be a condition of things in such a stage of the voyage sufficient to satisfy the character of seaworthiness, would fall far short of that required at its commencement. Seaworthiness applies to the intended uses and purposes to which the vessel is to be applied. Hucks *v.* Thornton, Holt, N. P. 30. In this case, the risk was to commence August 1, 1806. The vessel sailed on her voyage in 1805. *Gibbs*, C. J., held, that she must have been seaworthy at the time the risk was to commence, and although the crew was greatly reduced in numbers, yet, if she had a competent force to pursue any part of her adventure, and could be safely navigated home, she was seaworthy. See Cruder *v.* Phil. Ins. Co. 2 Wash. C. C. 262, 389. In Gibson *v.* Small, 24 Eng. L. & Eq. 36, *Parke*, B., says: "It is undoubted law that there is an implied warranty with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it, or had been seaworthy when the voyage insured had been commenced, if the insurance is on a vessel already at sea for the voyage, which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of seaworthiness at the commencement of the risk." See, also, remarks of *Pollock*, C. B., on page 43; and *infra*, p. 248, n. 1.

[3] Tidmarsh *v.* Washington Ins. Co. 4 Mason, 439.

of the period, we should answer, she must be seaworthy in the beginning, only in the sense in which her then place and condition require — as, if in port, seaworthy for that; if just going to sea, seaworthy for that; if at sea, seaworthy for that. And then she must be kept in a seaworthy state, which means fit to encounter the perils of any service she is put to, from time to time, during the whole period. And if at any time during that period, she is unseaworthy for her then place and work, through the fault of the insured or his agents, and a loss occurs by reason of such unseaworthiness, the insurers will not be liable therefor.[1]

[1] The question whether there is any implied warranty of seaworthiness, and if any, what, in a time-policy, has lately been the subject of considerable discussion. A comparatively early American case decided that there is such an implied warranty when the vessel sails from her original port on a time-policy. Am. Ins. Co. *v.* Ogden, 20 Wend. 287. The subject has been most elaborately discussed in England in the case of Small *v.* Gibson, 3 Eng. L. & Eq. 299. "Insurance was made on the ship Susan, 'lost or not lost,' for twelve months, commencing Sept. 25, 1853. The defendant pleaded that the vessel was unseaworthy at the time the policy was made, and on Sept. 25, when the risk commenced. The Court of Queen's Bench sustained this plea; but on writ of error being brought, the judgment was reversed by the Court of Exchequer, 3 Eng. L. & Eq. 299. A writ of error was then taken to the House of Lords, and the decision of the Court of Exchequer affirmed. 24 Eng. L. & Eq. 16. The plea, as stated in 3 Eng. L. & Eq. 299, would seem to show that the defence was taken that the vessel was unseaworthy when she left home on the voyage. That this is not so is shown by the plea, as given in 24 Eng. L. & Eq. and by the remarks of *Parke*, B., on this point, p. 42. Two questions then were raised; 1st, whether there was an implied warranty of seaworthiness when the risk commenced; and 2d, whether there was any when the policy was made. The question whether there was any when the voyage commenced was, however, presented to the judges, and by them considered, though they expressly say that it was not necessary to decide it. In 3 Eng. L. & Eq. 299, *Parke*, B., says: "We are far from arguing that there is no warranty of seaworthiness at all, — so to hold would be to let in the mischief which the law provides against, by the implied warranty in a voyage policy, — or that there is not the same warranty in the case of a time-policy, according to the situation in which the ship may be at the commencement of the term of the insurance. If, then, a ship were insured in terms, from a given day, for the remainder of the voyage to a foreign port, there may be a warranty of seaworthiness when the voyage commenced." He then goes on to say that if the vessel had met with damage, and could have been repaired, but was not, previous to the commencement of the risk, the policy might not attach. And that all the court intended to decide was, that there was no warranty of seaworthiness wherever the ship might be, or in whatever circumstances placed, at the commencement of the term insured. In the House of Lords the judges stood seven to two on the questions presented by the plea. Lord St. Leonards and Lord Campbell concurred with the majority. The other point in regard to a time-policy on a vessel, beginning on her departure from her home port, was not discussed by all the judges. Lord Campbell was in favor of not having an implied warranty in any case. Lord St. Leonards on p. 48, and Martin, B., on p. 20, 22, thought the same rule in such a case would apply to a time as well as to a voyage contract of insurance. In Jones *v.* Ins. Co. 2 Wallace, 278, Mr. Justice *Grier* held that there was no implied warranty in a time-policy, with three exceptions. Speaking of Small *v.* Gibson, as decided in the Exchequer, he says: "It is true that this case does not decide that there is no warranty of seaworthiness at all in a time-policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage. It may be true, also, that there is in a time-policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship met with damage before, and could have been repaired with the exercise of reasonable care and pains, and was not, the policy would not attach. But in all such cases, the plea must

There are other implied warranties. One of these is, that the insured shall deal honestly with the insurer, and make a distinct and true statement of all material circumstances affecting the risk. Another is, that the ship shall pursue the usual course of her voyage, without deviation from it, or the unnecessary encounter of unusual risks. But these will be considered in subsequent sections.

SECTION IX.

OF REPRESENTATION AND CONCEALMENT.

If there be an affirmation or denial of any fact, or an allegation which would lead the mind to that conclusion, — whether made orally or in writing, or by exhibition of any written or printed paper, or by a mere inference from the words of the policy, before the making of the policy, or at the making, and the same be false, and tend to procure for him who makes it, the bargain, or some advantage in the bargain, it is a *misrepresentation*.[1] And it is

state such facts and circumstances as shall show either that at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss, or that, having come into a distant port in a damaged condition, before or after the commencement of the risk, where she might and ought to have been repaired, and the owner or his agents neglected to make such repairs, and the vessel was lost by a cause which may be attributed to the insufficiency of the ship." In the case of Capen *v.* Washington Ins. Co. decided by the Supreme Court of Massachusetts, November term, 1853, (not yet reported,) the policy was subscribed April 30; the risk commenced March 30, at noon, to continue one year, on the ship Rique, to and at all ports and places to which she might proceed in that time. The vessel was at sea in March, and returned to Boston the following September, and was destroyed by fire in a subsequent voyage. At the trial in the court below, *Shaw*, C. J., ruled that there was no implied warranty, in the ordinary acceptation of that term, either at the time that the policy was underwritten, or on the day the risk was to commence, but that the only implied warranty in this respect was that the vessel was to be in existence as a vessel at the time fixed for the commencement of the risk; capable, if then in port, of being made useful, with proper repairs and fittings, for navigation, and was seaworthy when she first sailed from port; or if at sea when the risk commenced, that she had sailed in a seaworthy condition, and was safe so as to be a proper subject of insurance at the time the risk attached. But if the vessel was then lost, had become a wreck, or ceased to exist as a vessel, or was, if at sea, in such a condition that she could not on her arrival in port, be made available, by seasonable and suitable repairs, for navigation, then there was no subject for the policy to take effect upon. As exceptions were taken to these rulings, and the rulings sustained in the Supreme Court, *Shaw*, C. J., giving the opinion, it is presumed that they are substantially in accordance with the law as finally laid down. In Jenkins *v.* Heycock, 8 Moore, P. C. Cases, 351, decided in the Privy Council in 1853, the vessel was seaworthy at the commencement of the risk, but became unseaworthy afterwards. The court held that this did not avoid the policy. They also said: "If it were necessary for the decision of this case, we should be inclined to go to the full extent of what Lord Campbell says in the House of Lords."

[1] Livingston *v.* Maryland Ins. Co. 7 Cranch, 506; N. Y. Firemen Ins. Co. *v.* Walden, 12 Johns. 517; Pawson *v.* Watson, Cowp. 785. See also cases *infra*.

the same thing, whether it refers to a subject concerning which some representations were necessary or otherwise.[1]

Concealment is the suppression of a fact not known to the other party, referring to the pending bargain, and material thereto; and the effect of it is not removed by a result which shows that the circumstances to which it refers, do not enter into the risk.[2]

A misrepresentation or a concealment discharges the insurers. To have this effect it must continue until the risk begins, and then be material.[3]

It is no defence that it arose from inadvertence or misapprehension, because the legal obligation of a full and true statement is absolute;[4] nor that the insurers were not influenced by it, if it were wilfully made with intention to deceive.[5]

If it be in its nature temporary and begins after the risk begins, and ends before a loss happens, the insurers are not discharged.[6] And if it relate to an entirely several subject-matter of insurance,

[1] Sibbald *v.* Hill, 2 Dow, P. C. 263. In this case the party wishing to obtain insurance stated to the underwriter that eight guineas was the highest he had paid for the same risk in London, whereas he had paid twenty-five. The House of Lords held that the contract was void, on the ground "that every misrepresentation is fatal to a contract which is made under such circumstances, and in such a way as to gain the confidence of the other party, and induce him to act when otherwise he would not." See, also, De Costa *v.* Scandret, 2 P. Wms. 170; Hoyt *v.* Gilman, 8 Mass. 336.

[2] Hoyt *v.* Gilman, 8 Mass. 336; Seaman *v.* Fonereau, 2 Str. 1183. In Lynch *v.* Hamilton, 3 Taunt. 37, *Mansfield*, C. J., says: "A person insuring is bound to communicate every intelligence he has that may affect the mind of the underwriter in either of these two ways, — first, as to the point whether he will insure at all; and secondly, as to the point at what premium he will insure." In Lynch *v.* Dunsford, 14 East, 494, intelligence was not communicated, and the report of the supposed risk afterwards turned out to be untrue. It was held that the policy was nevertheless avoided. If the risk which the underwriter has to run be covered by a warranty, then as to that a representation is not necessary. Shoolbred *v.* Nutt, Park on Ins. 493; Haywood *v.* Rodgers, 4 East, 590. See, also, Ruggles *v.* Gen. Int. Ins. Co. 4 Mason, 74, and cases cited. p. 80; Carter *v.* Boehm, 3 Burrow, 1905; Rickards *v.* Murdock, 10 B. & C. 527; Beckwith *v.* Sydebotham, 1 Camp. 116.

[3] 2 Duer on Ins. 702.

[4] In Burritt *v.* Saratoga Co. M. F. Ins. Co. 5 Hill, 188, *Bronson*, J., says: "In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk, will avoid the policy although no fraud was intended. See also, Curry *v.* Commonwealth Ins. Co. 10 Pick. 535; N. Y. Bowery Ins. Co. *v.* N. Y. Fire Ins. Co. 17 Wend. 359; Bridges *v.* Hunter, 1 M. & S. 15; Fitzherbert *v.* Mather, 1 Term, 12; Bufe *v.* Turner, 6 Taunt. 338. See also Dennison *v.* Thomaston Mut. Ins. Co. 20 Maine, 125.

[5] 1 Phillips on Ins. § 541; Arnould on Ins. 500.

[6] This question has not yet come before the courts. In 2 Duer on Ins. p. 698, the author says: "That when the breach of a representation is transitory in its nature, and the immediate peril is surmounted, it would be held by the tribunals of the continent not to affect the validity of the contract, I have, indeed, no doubt; but that such would be the rule, when the breach, without producing a loss, changes essentially the subsequent risks, I am not prepared to affirm." See also, cases on Warranties, *ante*, p. 426, n. 2.

as the goods only, and has no effect upon the risk as to the rest, it discharges the insurers only as to that part.[1] Ignorance is never an excuse, if it be wilful and intentional. If one says only, "he believes so and so," the fact of his belief in good faith is sufficient for him. But if he says that is true, of which he does not know whether it be true or false, and it is actually false, it is the same misrepresentation as if he knew it to be false. If a statement relate to the future, a future compliance or fulfilment is necessary.[2]

Any statement in reply to a distinct inquiry, will be deemed material; because the question implies that it is.[3] On the other hand, the insured is not bound to communicate any mere expectation or hope or fear; but only all the facts material to the risk.[4]

If the concealment or misrepresentation by the insured arose from the master's concealment from his owner, it seems to be the law in this country, that the insurers are not discharged.[5] If the insured state honestly that he is informed so and so, giving his authorities, this is no misrepresentation, although he is misinformed.[6] But generally, the insured who procures insurance through an agent, is liable for that agent's concealment or misrepresentation, although unknown and unauthorized by him.[7]

If one who is insured, proposes to another insurer a second

[1] 1 Phillips on Ins. § 680.

[2] Callaghan *v.* Atlantic Ins. Co. 1 Edwards, Ch. 64. In this case, in the application for insurance, the vessel was described to be in a certain port. The court held that if this was not a warranty, still it was a material representation, and if false would avoid the policy. But that if it had been stated that she was there according to last advices, or was there on such a day and intended remaining till such a time, it would have been different. See also Hubbard *v.* Glover, 3 Camp. 313; Bowden *v.* Vaughan, 10 East, 415; Kemble *v.* Bowne, 1 Caines, 75; Maryland Ins. Co. *v.* Bathurst, 5 Gill & Johns. 159; Pawson *v.* Watson, Cowp. 785; Whitney *v.* Haven, 13 Mass. 172; Bryant *v.* Ocean Ins. Co. 22 Pick. 200; Rice *v.* N. Eng. Mar. Ins. Co. 4 Pick. 439; Christie *v.* Secretan, 8 Term, 192; Brine *v.* Featherstone, 4 Taunt. 869; Astor *v.* Union Ins. Co. 7 Cowen, 202.

[3] Burritt *v.* Saratoga Co. Mut. F. Ins. Co. 5 Hill, 188; 1 Phillips on Ins. § 542; 2 Duer on Ins. 688; Dennison *v.* Thomaston Mut. F. Ins. Co. 20 Maine, 125.

[4] Bell *v.* Bell, 2 Camp. 475. But if the beliefs or expectations are of such a nature that, if communicated, they would influence the mind of the insurer in determining whether to take the risk or not, and if he would take it, at what premium, they should be made known. Willes *v.* Glover, 1 New Rep. 14; Marshall *v.* Union Ins. Co. 2 Wash. C. C. 357.

[5] Ruggles *v.* Gen. Int. Ins. Co. 4 Mason, 74; Gen. Int. Ins. Co. *v.* Ruggles, 12 Wheat. 408. In England, a different rule appears to be laid down. Fitzherbert *v.* Mather, 1 Term, 12; Gladstone *v.* King, 1 M. & S. 35. These cases, however, were cited by counsel in Gen. Int. Ins. Co. *v.* Ruggles, and were commented on by Mr. Justice Thompson, in delivering the opinion of the court. They were not considered by him to warrant the conclusions contended for.

[6] Tidmarsh *v.* Washington Ins. Co. 4 Mason, 439, 443. Per *Story*, J. See also 1 Phillips on Ins. § 563.

[7] See cases cited *ante*, note 5; also Stewart *v.* Dunlop, 4 Brown, Parl. Cas. 483.

insurance on the same policy, on the same terms expressly or impliedly, and the first is founded on concealment or misrepresentation, this taint extends to the second.[1]

A premium much lower than would be proper for a certain risk if certain facts were disclosed, may be evidence tending to show that they were not disclosed.[2]

SECTION X.

WHAT THINGS SHOULD BE COMMUNICATED.

Not only ascertained facts should be stated by the insured, but intelligence, and mere rumors, if of importance to the risk; and it has been held that intelligence known to his clerks would be generally presumed to be known to him;[3] and it is no defence that the things have been found to be false.[4] It has been held that an agent was bound to state that his directions were sent him by express; because this indicated an emergency.[5] If the voyage proposed would violate a foreign law not generally known, this should be stated.[6]

It is impossible to give any other criterion to determine what should be communicated, than the rule that every thing should be stated which might reasonably be considered in estimating the risk. And it is obvious that the season, or political events, or the character of the voyage, may make that material in a par-

[1] New York Bowery F. Ins. Co. *v.* New York Ins. Co. 17 Wend. 359; Pawson *v.* Watson, Cowper, 785; Barber *v.* Fletcher, Doug. 305; Feise *v.* Parkinson, 4 Taunt. 640. But this rule applies only to representations favorable to the underwriter and not to those which would, if communicated, increase their liability. Robertson *v.* Marjoribanks, 2 Starkie, 573. In Bell *v.* Carstairs, 2 Camp. 543, Lord *Ellenborough* says: "It is difficult to see on what principle of law a representation to the first underwriter is considered as made to all those who afterwards underwrite the policy. That rule being established, I will abide by it; but I will, by no means, allow it to be extended. You must show the representations to have been made to the first underwriter on the policy, or to the defendant himself." In Marsden *v.* Reid, 3 East, 572, it was intimated by the court that if it had appeared that a material fact had been represented to the first underwriter to induce him to subscribe the policy, it should be taken to have been made to all the rest without the necessity of repeating it to each.

[2] Bridges *v.* Hunter, 1 M. & S. 19; Freeland *v.* Glover, 7 East, 457; Nicoll *v.* Am. Ins. Co. 3 Wood. & Minot, 529, 535.

[3] Himely *v.* Stewart, 1 Brevard, 209; Byrnes *v.* Alexander, 1 id. 213.

[4] See *ante*, p. 430, n. 2.

[5] Court *v.* Martineau, 3 Doug. 161. In this case it was held that such a fact need not be disclosed where the dates plainly show that the message must have so come. And see 1 Phillips, § 581.

[6] Hoyt *v.* Gilman, 8 Mass. 336. See also *ante*, p. 409, n. 4.

ticular case, which is not so generally; as the national character of the ship or goods;[1] whether contraband or not;[2] the interest of the insured;[3] the time of sailing;[4] and the last news as to weather and the like, from that part of the ocean in which the ship to be insured is supposed to be.[5] And so every other thing of any kind which the insurer might reasonably wish to take into consideration in estimating the value of the risk which he is invited to assume.[6]

The question, however, being one of concealment as it affects the estimation of the risk, it is obvious that the insured need not state to the insurer things which he already knows; and by the same reason he is not bound to state things which the insurer ought to know, and might be supposed to know. These are, in general, all those things which the insured learns by means which are quite as open to the insurer as they are to him;[7] as general facts widely published, and known by others long enough to justify the inference that all interested in such matters are acquainted with them.[8] So things resting upon a general rumor, which is known to all alike.[9] So facts of science; as the position of a port; the peculiar dangers or liabilities of any well known navigation; the prevalence of winds, currents, or weather of any particular description at a certain place or in a certain season.[10] Whether the suppression of such a thing be a faulty concealment on the part of the insured, or only an innocent silence, must depend upon the standard above stated. If it be known to him in such a way, that he ought as a reasonable man to doubt whether the insured knows it, then he ought as an

[1] Campbell *v.* Innes, 4 B. & Ald. 423.

[2] Seton *v.* Low, 1 Johns. Cas. 1. See *ante*, p. 417, note 2.

[3] Wolcott *v.* Eagle Ins. Co. 4 Pick. 429; Lawrence *v.* Aberdein, 5 B. & Ald. 107; Coit *v.* Smith, 3 Johns. Cas. 16.

[4] Per *Story*, J., in M'Lanahan *v.* The Universal Ins. Co. 1 Peters, 170, 189; M'Andrew *v.* Bell, 1 Esp. 373; Webster *v.* Foster, 1 Esp. 407; Johnson *v.* Phœnix Ins. Co. 1 Wash. C. C. 378; Livingston *v.* Delafield, 3 Caines, 49. See also, Rice *v.* N. Eng. M. Ins. Co. 4 Pick. 439; Fiske *v.* New Eng. Mar. Ins. Co. 15 Pick. 310; Littledale *v.* Dixon, 1 Bos. & Pul. N. R. 151.

[5] Moses *v.* Delaware Ins. Co. 1 Wash. C. C. 385; Fiske *v.* N. Eng. M. Ins. Co. 15 Pick. 317; Ely *v.* Hallett, 2 Caines, 57.

[6] See cases cited *supra*, generally.

[7] Carter *v.* Boehm, 3 Burrow, 1910. "But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon." Per Lord *Mansfield*.

[8] Friere *v.* Woodhouse, 1 Holt, N. P. 572; Elton *v.* Larkins, 8 Bing. 198; Green *v.* Merchants' Ins. Co. 10 Pick. 402.

[9] Alsop *v.* Commercial Ins. Co. 1 Sumner, 451.

[10] De Longuemere *v.* N. Y. Fire Ins. Co. 10 Johns. 120; Stewart *v.* Bell, 5 B. & Ald. 238; Kingstone *v.* Knibbs, 1 Camp. 508, n.; Bell *v.* Mar. Ins. Co. 8 Serg. & Rawle, 98.

honest man to put an end to the doubt by stating it; otherwise he may be silent.[1] And so he may be about any thing expressly provided for in the policy, unless he be expressly interrogated on the subject.[2]

If either party says to the other so much as should put the other upon inquiry, in reference to a matter about which inquiry is easy and would lead to information, and the other party makes no inquiry, his ignorance is his own fault, and he must bear the consequences of it.[3]

An intention, which if carried into effect would discharge the insurers, as, for example, an intention to deviate, need not be stated, unless the intention itself can be shown to affect the risk.[4] So a part damage to the property need not be stated, unless it affects its present probability of safety.[5]

A false statement that other insurers have taken the risk on such or such terms, is a misrepresentation, but not a false statement of an opinion that they would take it on such terms,[6] for of this the insurers can judge for themselves.

Every statement or representation will be construed rationally, and so as to include all just and reasonable inferences. A substantial compliance with it will be sufficient; and a literal compliance which is not a substantial one, will not be sufficient.[7]

[1] Dickenson *v.* Com. Ins. Co. Anthon's N. P. 126.

[2] Walden *v.* N. Y. Firemen Ins. Co. 12 Johns. 128; Farmers' Ins. Co. *v.* Snyder, 16 Wend. 481; Lexington Ins. Co. *v.* Paver, 16 Ohio, 324; Coulon *v.* Bowne, 1 Caines, 288.

[3] Court *v.* Martineau, 3 Doug. 161; Fort *v.* Lee, 3 Taunt. 381; Alsop *v.* Commercial Ins. Co. 1 Sumner, 451; Carr *v.* Hilton, 1 Curtis, 390.

[4] Houston *v.* N. Eng. Ins. Co. 5 Pick. 89; Firemen Ins. Co. *v.* Lawrence, 14 Johns. 46. In this case, *Kent*, Chancellor, says: "An intention to deviate is nothing, because the intention may be given up before the vessel arrives at the dividing point; but if the captain be under positive instructions to take one course, and not the other, he has no discretion to act, and no liberty to repent. This cause alone is sufficient to discharge the underwriter." For this position, Middlewood *v.* Blake, 7 Term, 162, is cited by the learned Chancellor. In this case, the insurance was on a vessel on a voyage from London to Jamaica. The captain had instructions to stop at Cape Nicola Mole, in St. Domingo. She was captured after having passed the dividing point of three different tracks to Jamaica, but before she had reached the sub-dividing point of the courses to the Mole and to Jamaica. It was held that the underwriters were discharged. Some of the judges put it on the ground that the captain had no discretion at the first dividing point, and consequently the deviation took place then. See also the opinion of *Lawrence*, J., in this case; The Marine Ins. Co. *v.* Tucker, 3 Cranch, 357.

[5] Boyd *v.* Dubois, 3 Camp. 133; Gladstone *v.* King, 1 Maule & Sel. 35.

[6] Sibbald *v.* Hill, 2 Dow, P. C. 263; Clason *v.* Smith, 3 Wash. C. C. 156.

[7] Suckley *v.* Delafield, 2 Caines, 222; Alsop *v.* Coit, 12 Mass. 40; Murray *v.* Alsop, 3 Johns. Cas. 47; Vandenheuvel *v.* United Ins. Co. 2 Johns. Cas. 173, n.; Pawson *v.* Watson, Cowp. 785.

SECTION XI.

OF THE PREMIUM.

This is undoubtedly due when the contract of insurance is completed; but in practise in this country, the premium in marine insurance is usually paid by a premium note on time, which is given at or soon after the delivery of the policy. If the policy acknowledge the receipt of the premium, if it be not paid, this receipt would be no bar to an action for it.[1]

The premium is not due unless the risk is incurred;[2] whether this be caused by the non-sailing of the ship; or by the insured not having goods on board;[3] or not so much cargo as he is insured for; or by any error or falsity in the description which prevents the policy from attaching.[4]

If the premium be not earned, or not wholly earned, it must be returned in whole or in part by the insurers if it have been paid; and not charged in account with the insured, if it be unpaid.[5]

The premium may be partially earned; and then there must be a part return only. As if the voyage consist of several passages, or of "out and home" passages, and these are not connected by the policy as one entire risk;[6] or if the insured has some goods at risk, but not all which he intended to insure.[7]

[1] In England the law is, that as against the assured the underwriter cannot set up that the broker has not paid the premium of which he has acknowledged the receipt. Anderson *v.* Thornton, 20 Eng. L. & Eq. 339. But between the underwriter and the broker it is not conclusive. See Foy *v.* Bell, 3 Taunt. 493. In Ins. Co. of Penn. *v.* Smith, 3 Whart. 520, it was held that a policy of insurance did not differ from any other contract in this respect, and that a receipt might therefore be inquired into. For the law in regard to a receipt being conclusive or not, see 1 Greenl. Evid. p. 354.

[2] Tyrie *v.* Fletcher, Cowp. 666. In this case, Lord *Mansfield* says: "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned." See also, Emerigon on Ins. (Meredith's ed.) p. 52.

[3] Waddington *v.* United Ins. Co. 17 Johns. 23.

[4] Foster *v.* U. S. Ins. Co. 11 Pick. 85; Amery *v.* Rodgers, 1 Esp. 207; Holmes *v.* United Ins. Co. 2 Johns. Cas. 329.

[5] Taylor *v.* Sumner, 4 Mass. 56; M'Culloch *v.* Roy, Exch. Ass. Co. 3 Camp. 406.

[6] Waters *v.* Allen, 5 Hill, 421; Lovering *v.* Mercantile Mar. Ins. Co. 12 Pick. 348; Stevenson *v.* Snow, 3 Burr. 1237. In Homer *v.* Dorr, 10 Mass. 26, there was an insurance on a cargo from Boston to Archangel and back. The outward cargo was safely landed, but no homeward cargo was shipped. A usage was proved in such a case to return the premium for the homeward voyage. But the court decided against it. The premium was given for the whole voyage.

[7] See *ante*, n. 4.

It is however an invariable rule, that if the whole risk attaches at all, that is, if there be a time, however short, during which the insurers might in case of loss from a sea-peril, be called on for the whole amount they insure, there is to be no return of premium.[1]

If there be simultaneous policies, and taken together they cover more than the whole amount at risk, there must be a pro rata return of premium. If they are not simultaneous, and the earlier policies attached for their whole amount before the later ones were made, the earlier ones earn their whole premium; and the later policies must return theirs, in whole or in part.[2]

If the policy be effected by an agent who is responsible for the premium, and the insurance is neither authorized nor confirmed by the principal, there is no return of premium for this cause, if the principal might have adopted the insurance and made it obligatory on the insurers, at a time when the property insured was at risk.[3]

If the note be signed by an agent, the insurers may look to a principal actually insured by it, whether known or unknown to them at the time. Unless it can be inferred from the facts or otherwise shown that with a knowledge of the principal, the insurers accepted the note of the agent or broker as that upon which they should exclusively rely.[4]

[1] Tyrie *v.* Fletcher, Cowper, 666. In this case the insurance was on a vessel warranted free from capture, for twelve months, at 9*l.* per cent. The vessel was taken by a privateer about two months after she sailed. It was held that no part of the premium was to be returned. See also Taylor *v.* Lowell, 3 Mass. 331; Hendricks *v.* Com. Ins. Co. 8 Johns. 1; Loraine *v.* Tomilson, Doug. 585; Moses *v.* Pratt, 4 Camp. 297; Tait *v.* Levi, 14 East, 481.

[2] Fisk *v.* Masterman, 8 Mee. & Wels. 165. Insurance was effected on the 12th of April, on a cargo of cotton at sea, by five policies, and on the 13th, a further insurance was made by six different policies. Taken together they exceeded in value the amount at risk, but the amount insured by the five did not. It was held that the assured were entitled to a return of premium on the amount of the over insurance to which the underwriters of the 13th were to contribute ratably, the amount of over insurance to be ascertained by taking into account all the policies, but that no return of premium was to be made in respect of the policies effected on the 12th. See cases cited p. 420, n. 4. The doctrine of Fisk *v.* Masterman, is founded on the principle that those underwriters, who have, at any time, been liable to pay the whole amount of their subscriptions, are entitled to retain the whole amount of the premium. 2 Arnould on Ins. 1229; 2 Phillips on Ins. § 1838.

[3] Hagedorn *v.* Oliverson, 2 M. & S. 485; Routh *v.* Thompson, 13 East, 274. In this case, *Bayley, J.*, says: "Could the agent who procured the insurance, have recovered back the premiums paid by him, if the crown had not adopted the insurance? I should think not, because of the choice which the crown had to adopt it, in respect to which the insurer would have incurred the risks." See also Finney *v.* Fairhaven Ins. Co. 5 Met. 192, 197, where the doctrine of the two cases above cited is adopted.

[4] Paterson *v.* Gandassequi, 15 East, 62; Addison *v.* Gandassequi, 4 Taunt. 538; Thomson *v.* Davenport, 9 B. & C. 78. See 2 Smith's Leading Cases, 222, note; Ins. Co. of Penn. *v.* Smith, 3 Whart. 520; Patapsco Ins. Co. *v.* Smith, 6 H. & J. 166.

There is no return of premium for avoidance of the contract by its illegality; if both parties knew this and were equally in fault.[1]

In this country, insurers usually retain one half of one per cent. of a returnable policy. And our policies contain a clause permitting the insurers to set off the premium due against a loss, whether the note be signed by the insured or another.[2]

SECTION XII.

OF THE DESCRIPTION OF THE PROPERTY INSURED.

The description must be such as will distinctly identify the property insured, as by quantity, marks, and numbers, or a reference to the fact of shipment,[3] or the time of shipment,[4] or the voyage, or the consignee;[5] or in some similar and satisfactory way; and no mere mistake in a name, or elsewhere, vitiates the description if it leaves it sufficiently certain.[6] If different shipments come within the policy, the insured may attach it to either by his declaration, which may be done after the loss, provided

[1] If an illegal insurance is effected which is not known to be such at the time, as where the insured was the subject of a foreign country, with which war had been declared, though the parties were ignorant of it at the time, the premium may be recovered back. Oom *v.* Bruce, 12 East, 225. But where the fact was known, the maxim *in pari delicto potior est conditio possidentis* will apply. See Lowry *v.* Bourdieu, Doug. 468; Andre *v.* Fletcher, 3 Term, 266; Vandyck *v.* Hewitt, 1 East, 96; Lubbock *v.* Potts, 7 East, 449; Juhel *v.* Church, 2 Johns. Cas. 333. The question has arisen whether a party effecting an illegal insurance, and having paid the premium, has not a *locus pœnitentiæ*, so that he can rescind the contract, and recover the premium, before a loss occurs. It was held that he might in Tappenden *v.* Randall, 2 Bos. & Pul. 467; and in Aubert *v.* Walsh, 3 Taunt. 277. This view is also supported by *Buller*, J., in Lowry *v.* Bourdieu, Doug. 468. But in Palyart *v.* Leckie, 6 M. & S. 290, it was held that to entitle the assured to recover back the premium in such a case, he must have made a formal renunciation of the contract prior to the bringing of the action, although the adventure had never commenced. Lord *Ellenborough* expresses his regret that the rule of *locus pœnitentiæ* was ever adopted.

[2] Wiggin *v.* Suffolk Ins. Co. 18 Pick. 145. See 2 Phillips on Ins. § 1839.

[3] Murray *v.* Col. Ins. Co. 11 Johns. 302; Rickman *v.* Carstairs, 5 B. & Ad. 651; Hunter *v.* Leathley, 10 B. & C. 858. See also M'Cargo *v.* Merch. Ins. Co. 10 Rob. La. 334; Courtnay *v.* Miss. F. & M. Ins. Co. 12 La. 233.

[4] Sorbe *v.* Merch. Ins. Co. 6 Louis. 185. In this case the insurance was on goods to be shipped from Havre or any port south of it in France during a period of six months. The goods were put on board before the expiration of the time, but the ship did not sail till after. *Held* that they were covered. See, however, Atkins *v.* The Boylston F. & M. Ins. Co. 5 Met. 439.

[5] Ballard *v.* Merch. Ins. Co. 9 La. 258.

[6] Ruan *v.* Gardner, 1 Wash. C. C. 145; Hall *v.* Mollineaux, cited in Le Mesurier *v.* Vaughan, 6 East, 382, 386; Clapham *v.* Cologan, 3 Camp. 382; Emerigon, Meredith's ed. c. 6, § 2.

this appears to have been the intention of the parties.[1] "Cargo," "goods on board," "merchandise" mean much the same thing; and do not attach to ornaments, clothing or the like, owned by persons on board and not intended for commercial purposes.[2] "Property" is the word of widest, and almost unlimited meaning.[3] "Ship" or "vessel" includes all that belongs to it at the time[4] — even to sextants or chronometers belonging to the shipowner, and by him appropriated to the navigation of the ship.[5] So it includes all additions or repairs made during the insurance.[6]

The phrase, "a return cargo," will generally apply to a homeward cargo of the party insured in the same ship, however it be procured; but the phrases "proceeds" or "returns," are generally regarded as limited to a return cargo bought by means of the outward cargo.[7] And neither of these, or any similar phrases, will apply to the same cargo brought back again, unless it can be shown, by the usage, or other admissible evidence, that this was the intention of the parties.[8]

The interest of the insured need not be specified, unless peculiar circumstances, closely connecting this interest with the risk,

[1] See Henchman *v.* Offley, 2 H. Bl. 345, n. In Kewley *v.* Ryan, 2 H. Bl. 343, there were two cargoes to which the policy would apply. The court held that the insured had a right to apply it to either so that they came within the terms of the policy. See Harman *v.* Kingston, 3 Camp. 150; Edwards *v.* St. Louis Perpetual Ins. Co. 7 Missouri, 382.

[2] Ross *v.* Thwaites, Park on Ins. 23.

[3] In Whiton *v.* Old Colony Ins. Co. 2 Met. 1, it was held that the term "property" included current bank bills on board a vessel, the insured intending to use the same in purchasing merchandise, which would, when bought, be covered by the policy. See also Wiggin *v.* Mer. Ins. Co. 7 Pick. 271; Holbrook *v.* Brown, 2 Mass. 280.

[4] Robertson *v.* Ewer, 1 Term, 127; Forbes *v.* Aspinall, 13 East, 325; Brough *v.* Whitmore, 4 Term, 208; Hill *v.* Patten, 8 East, 373; Blackett *v.* Roy. Ex. Ass. Co. 2 Cr. & Jer. 244; Hall *v.* Ocean Ins. Co. 21 Pick. 472.

[5] 1 Phillips on Ins. § 468

[6] Le Cheminant *v.* Pearson, 4 Taunt. 367.

[7] Haven *v.* Gray, 12 Mass. 71; Whitney *v.* Am. Ins. Co. 3 Cowen, 210; S. C. 5 Cowen, 712. In this case the insurance was on the outward cargo and the returns home. The returns were valued in the policy at $14,000. The court held that if the outward cargo had been sold for $7,000, and the return cargo purchased with the avails, the insured could recover to the amount of $14,000; and so if the outward cargo had been pledged to the full value instead of being sold.

[8] Dow *v.* Hope Ins. Co. 1 Hall, 166; Dow *v.* Whetten, 8 Wend. 160. In this case, the captain, on arrival at the outward port of destination, finding no market for the goods, brought them home again. They were damaged on the homeward voyage, and the owners claimed to recover on the ground that the term "proceeds" would cover the same goods if brought home. The Superior Court of New York City decided in favor of the defendants. An appeal was taken to the Supreme Court, and the plaintiff nonsuited. It then came up before the Court of Errors, (8 Wend. 160,) and the judgment of the Supreme Court was reversed solely on the ground that evidence was rejected tending to show a usage that the term "proceeds" was meant to cover the same goods if brought back.

may make this necessary.[1] But either a mortagor or a mortgagee,[2] a charterer,[3] an assignee,[4] or consignee,[5] or trustee,[6] or carrier,[7] may insure as on their own property.

We have seen that it is common to cover profits by valuation of the goods;[8] but no insurance on ship, goods, or freight, will, *as such*, cover the profits.[9]

So it is common to cover the freight by over-valuation of the ship; but an open policy on the ship does not cover the freight. An owner of both ship and cargo may cover by the word freight, what his ship would earn by carrying that cargo for another.[10] Insurance on freight from one port to another, covers the freight on goods taken in by agreement at ports intermediate to them.[11] But if the insurance be on freight, and the description of the goods be such that the insurance, had it been on goods, would not have attached, the insurance will not attach to the freight.[12]

Freight "to" a place is valid, although the cargo is to go further, and the freight be paid only at the more distant port.[13] But insurance on freight "at and from" a place does not cover freight "to" that place.[14] If a charterer pays a certain price to the

[1] Lawrence *v.* Van Horne, 1 Caines, 276; Murray *v.* Columbian Ins. Co. 11 Johns. 302.

[2] Traders' Ins. Co. *v.* Robert, 9 Wend. 404; Carpenter *v.* Providence Wash. Ins. Co. 16 Peters, 495. See also *ante*, p. 413, n. 5.

[3] Oliver *v.* Greene, 3 Mass. 133; Bartlet *v.* Walter, 13 Mass. 267.

[4] Paradise *v.* Sun Mut. Ins. Co. 6 La. Ann. R. 596.

[5] Putnam *v.* Mercantile Mar. Ins. Co. 5 Met. 386. See also De Forest *v.* Fulton F. Ins. Co. 1 Hall, 84. In this case the question of the right of a special owner to insure without specifying his interest, is thoroughly discussed. See *ante*, p. 413, n. 4.

[6] Stetson *v.* Mass. F. & Mar. Ins. Co. 4 Mass. 330; Bell *v.* Western Mar. & F. Ins. Co. 5 Rob. La. 424.

[7] See *ante*, p. 413, n. 2.

[8] See *ante*, p. 410, n. 9.

[9] Lucena *v.* Craufurd, 5 B. & P. 315.

[10] Wolcott *v.* Eagle Ins. Co. 4 Pick. 429, 435; Dumas *v.* Jones, 4 Mass. 647; Hart *v.* Del. Ins. Co. 2 Wash. C. C. 346; Flint *v.* Flemyng, 1 B. & Ad. 45.

[11] Barclay *v.* Stirling, 5 M. & S. 6.

[12] Adams *v.* Warren Ins. Co. 22 Pick. 163. In this case the insurance was on freight generally. The goods had not been put on board, but a specific contract had been entered into respecting them. Some were to be carried above, and some under deck. It was held that for the portion to be carried under deck the insured might recover his freight, but not for that which was to have been carried on deck. See also Wolcott *v.* Eagle Ins. Co. 4 Pick. 429; Allegre *v.* Maryland Ins. Co. 6 H. & J. 408.

[13] Taylor *v.* Wilson, 15 East, 324. Freight was insured, in this case, from St. Ubes to Portsmouth; the ship was to sail from St. Ubes to Gottenburgh intending to proceed first to Portsmouth. Held, that the plaintiff might recover, though the ultimate destination of the ship was not known to the underwriters. See also Hughes *v.* Un. Ins. Co. 3 Wheat. 159.

[14] Bell *v.* Bell, 2 Camp. 475. The policy was on freight "at and from Riga," in continuation of two other policies to Riga. The vessel was seized at Riga before the outward cargo was discharged. It was held that the policy did not apply to the freight lost, but to that of the return cargo.

owner, and has agreed to carry cargo for another at a higher price, he may insure the difference, which is his profit, under the name of freight.[1]

SECTION XIII.

OF THE PERILS COVERED BY THE POLICY.

The policy enumerates, as the causes of loss against which it insures, Perils of the Sea, Fire, Piracy, Theft, Barratry, Capture, Arrests, and Detentions;[2] and "all other perils," by which is meant by construction of law, all other perils of a like kind with those enumerated.[3]

It is a universal rule, that the insurers are liable only for *extraordinary* risks. The very meaning of "seaworthiness," which the insured warrants, is that the ship is competent to encount with safety all ordinary perils.[4] If she be lost or injured, and the loss evidently arose from an ordinary peril, as from common weather, or the common force of the waves, the insurers are not liable, because the ship should be able to withstand these as-

[1] Clark *v.* Ocean Ins. Co. 16 Pick. 289. In Riley *v.* Delafield, 7 Johns. 522, the plaintiff was not the charterer. Previous to the insurance he had owned the vessel, and had chartered her to A, and then had sold her to B. On account of the charter it was agreed between the plaintiff and B that the former should have the benefit of the freight arising from that voyage, which was the one insured. The plaintiff was thus neither the general owner of the vessel nor the owner *pro hac vice*, and on these grounds the court held that he could not recover, having insured his interest under the title of freight, without stating the circumstances of the case. In Mellen *v.* Nat. Ins. Co. 1 Hall, 463, the plaintiff, on the arrival of the vessel, was to receive a certain amount for carrying goods, and to pay an equal or greater amount as charterer. As he would lose nothing if she did not arrive, the court held that he had no insurable interest.

[2] The perils usually enumerated in the Boston policies are "of the seas, fire, enemies, pirates, assailing thieves, restraints, and detainments of all kings, princes, or people of what nation or quality soever, barratry of the master, unless the insured be owner of the vessel, and of mariners, and all the losses and misfortunes which have or shall come to the damage of the said ——— or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston." And they are substantially the same in our other commercial cities.

[3] In Ellery *v.* N. Eng. Ins. Co. 8 Pick. 14, it was held that damage done to a ship by the violence of the wind while being hauled upon a marine railway for the purpose of being repaired, and while she was partly on land, was covered by the general clause. In Butler *v.* Wildman, 3 B. & Ald. 398, dollars were thrown overboard to prevent their being captured. It was held that it was covered by the general clause. So where a ship was fired into by mistake and sunk. Cullen *v.* Butler, 5 M. & S. 461. See also Devaux *v.* J. Anson, 5 Bing. N. C. 519; Phillips *v.* Barber, 5 B. & Ald. 161; Skidmore *v.* Desdoits, 2 Johns. Cas. 77; Caldwell *v.* St. Louis Perpet. Ins. Co. 1 Louis. Ann. 85. See also Moses *v.* The Sun Mut. Ins. Co. 1 Duer, 159, *post*, 172, n.

[4] See M'Lanahan *v.* Univ. Ins. Co. 1 Peters, 170; Small *v.* Gibson, 3 Eng. L. & Eq. 299; S. C. 24 id. 16.

saults.[1] And if the loss be unexplained, and no extraordinary peril be shown or indicated, this fact would raise a very strong presumption of unseaworthiness.[2]

So the insurers are not liable for loss or injury by wear and tear, or natural decay, or the effect of age.[3] The ship itself, and every part of it, and everything which belongs to it, must give out at some time; and when it is actually lost, the insurers are not held without sufficient evidence of a cause adequate to the loss of such a thing, if it were in a good condition and properly secured. For without this evidence it would be presumed to have been lost by its own defect.[4]

It is, indeed, another universal rule, that the insurers are never liable for a loss which is caused by the quality of the thing lost. This rule applies, as above stated, to the ship, her rigging and appurtenances, when worn out by age or hard service. But its most frequent application is to perishable goods. The memorandum, already spoken of,[5] provides for this in some degree. But the insurers are liable for the loss of no article of merchandise whatever, if that loss were caused by the inherent qualities or tendencies of the article, *unless* these qualities or tendencies were excited to action, and made destructive by a peril insured against.[6] Thus, if hemp rots from spontaneous fermentation,

[1] In Bullard *v.* Rodger Williams Ins. Co. 1 Curtis, 148, Mr. Justice *Curtis* held that the law required vessels to be sufficiently strong to resist the ordinary action of the sea in the voyages for which they might be insured; but that the ordinary action of the wind and sea did not mean the winds and sea to be ordinarily met with in the voyage insured. He accordingly held that heavy cross-seas were not the ordinary action of the sea within the meaning of this rule, however common they might be in the voyage insured. See also *ante*, p. 425, n. 1.

[2] See cases cited *ante*, p. 425, n. 6.

[3] Where a cable is chafed by the rocks, or the fluke of an anchor broken off, in a place of usual anchorage, and under no extraordinary circumstances of wind and weather, this is ordinary wear and tear for which the owner is alone liable. Benecke, Pr. of Inden. 456. See also 1 Phillips on Ins. § 1105; Coles *v.* Marine Ins. Co. 3 Wash. 159; Dupeyre *v.* The Western Mar. & F. Ins. Co. 2 Rob. Louis. 457.

[4] In Coles *v.* Marine Ins. Co. 3 Wash. 159, it was held that it was not sufficient for the insured to prove that there were storms during the voyage, unless the injuries sustained could be fairly traced to that cause. In The Louisville Mar. & F. Ins. Co. *v.* Bland, 9 Dana, 143, a declaration which did not state the cause of the loss, nor that the loss arising from the damage to the goods, even if it were occasioned by one of the perils insured against, was one for which the insurers were liable under the several agreements of warranty, was held defective. See also Flemming *v.* Marine Ins. Co. 4 Whart. 59; Leftwitch *v.* St. Louis Perpet. Ins. Co. 5 Louis. Ann. 706.

[5] See *ante*, p. 421, n. 5.

[6] See Clark *v.* Barnwell, 12 How. 272; Tatham *v.* Hodgson, 6 Term, 656; 1 Emer. 393, c. 12, § 9; Goold *v.* Shaw, 1 Johns. Cas. 293; 2 id. 442. Nor are they liable for the waste occasioned by ordinary leakage. 2 Val. 83, tit. Ins. a. 31. Nor for breakage. Stevens, pt. 3, a. 1.

which cannot occur if it be dry, the insurers are not liable if the loss arose from the dampness which the hemp had when laden on board; but if the vessel were strained by tempest, and her seams opened, and the hemp was in this way wet, and then rotted, they are liable.[1]

The insurers do not, of course, insure any man against his own acts. But when we consider whether they are liable for losses caused by the agents or servants of the insured, it is necessary to make a somewhat nice distinction. Beginning with the general principle, which should apply as well to the contract of insurance as to all others, we say that the owner, as principal, is liable for the acts of his agents while they are acting as his agents, and only executing the work he gave them to do, in a manner which conforms with his instructions and authority. But for the negligence or wilful misconduct of the master or crew, the insurers may be liable, because, *in this respect*, they are not the agents of the owner. They are his agents, if he directed the very negligence or wrongful act which destroys the property insured, and the insurers are, of course, discharged.[2] So they are,

[1] In Boyd *v.* Dubois, 3 Camp. 133, insurance was effected on hemp, on a voyage from London to the coast of Devonshire. On the voyage, a fire broke out in the night, and the greater part of the cargo was consumed. Lord *Ellenborough* said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce, and generate the fire which consumed it; upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned."

[2] In General Int. Ins. Co. *v.* Ruggles, 12 Wheat. 410, *Thompson*, J., says: "If the loss of the vessel had been occasioned by any misconduct of the master, short of barratry, whilst in the prosecution of the voyage, and before the loss happened, or if, at the time this misconduct is alleged in him, he was the exclusive agent of the owner, for any purpose connected with procuring the insurance, the owner must bear the loss." In this case, the vessel had been lost before the insurance was procured, but the captain kept this fact from the owner, who procured the insurance *bonâ fide*. Held, that the insurers were liable. See Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222; Busk *v.* Roy, Exch. Ass. Co. 2 B. & Ald. 73; Jordan *v.* Warren Ins. Co. 1 Story, 342; Walker *v.* Maitland, 5 B. & Ald. 171; Dixon *v.* Sadler, 5 M. & W. 415; Williams *v.* Suffolk Ins. Co. 3 Sumn. 270; S. C. 13 Pet. 415. See also the remarks of *Shaw*, C. J., in Copeland *v.* New Eng. Mar. Ins. Co. 2 Met. 443. But if the master acts in bad faith, or is guilty of gross negligence in the discharge of his duty, or violate the law, then the underwriters are discharged. Cleveland *v.* Union Ins. Co. 8 Mass. 308; Phyn *v.* Roy. Exch. Ass. Co. 7 Term, 505; Siordet *v.* Hall, 4 Bing. 607; Coffin *v.* Newburyport Ins. Co. 9 Mass. 436. A more difficult question has arisen, whether the insurers are liable for a loss, the remote cause of which was the negligence of the master or mariners, but the proximate cause a peril insured against. In Andrews *v.* Essex Mar. Ins. Co. 3 Mason, 6, Mr. Justice *Story* considered this a vexed question. In Williams *v.* Suffolk Ins. Co. 3 Sumn. 276, he says: "As to the point of gross negligence, not amounting to fraudulent conduct, if such a case were made out, it would not help the defence. It has been repeatedly settled, by the Supreme Court of the United States, that, if the immediate cause of a loss is a peril insured against, it is no ground of defence that it was remotely caused by the negligence of the master or crew; the rule being, *causa proxima, non remota spectatur*." See also Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222; Columbian Ins.

if the misconduct be such as to prove the original unfitness of the master or crew, and therefore to show the unseaworthiness of the ship in this particular;[1] or if they give the insurers the defence of deviation, or the like.[2]

The insurers may take upon themselves whatever risks they choose to assume. And express clauses in a policy, or the uniform and established usage and construction of policies, may throw upon them, as in fact it does, a very large liability, for the effects of the misconduct — wilful or otherwise — of the master and crew. The clause relating to barratry, to be spoken of presently, is of this kind.[3]

If the cargo is damaged through the fault of the master or crew, the shipper has a remedy against the owner of the ship. But this does not necessarily discharge the insurers. If, however, he enforces his claim against them, he is bound to transfer to them, by a kind of subrogation, his claim against the shipowner. For the insurers of the cargo, by paying a loss thereon, put themselves, as it were, in the position of the shippers, and acquire their rights.[4]

Generally, no loss will be attributed to the negligence or default of the master or crew, which can be with as good reason attributed to any of the perils insured against.[5]

SECTION XIV.

OF PERILS OF THE SEA.

By this phrase is meant all the perils incident to navigation; and especially those arising from the wind and weather, the state of the ocean, and its rocks and shores. But it will be remem-

Co. *v.* Lawrence, 10 Pet. 507; Waters *v.* Merchants' Ins. Co. 11 Pet. 213; Delano *v.* Bedford Ins. Co. 10 Mass. 347; Walker *v.* Maitland, 5 B. & Ald. 171. See, however, De Vaux *v.* Salvador, 4 Ad. & Ell. 420. See also The Gen. Mut. Ins. Co. *v.* Sherwood, 14 How. 351; Matthews *v.* Howard Ins. Co. 1 Kernan, 9; Nelson *v.* Suffolk Ins. Co. 8 Cush. 477; Montoya *v.* London Ass. Co. 4 Eng. Law and Eq. 500. See, also, remarks in section 15, on Collision.

[1] If a ship sail with an incompetent crew, the policy, as we have seen, never attaches. Walden *v.* Firem. Ins. Co. 12 Johns. 133; Copeland *v.* N. E. Ins. Co. 2 Met. 432.

[2] See *infra*, tit. "Deviation."

[3] See *infra*.

[4] Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285; Bell *v.* Western M. & F. Ins. Co. 5 Rob. (Louis.) 423, 442; Russell *v.* Union Ins. Co. 4 Dall. 421; Gracie *v.* N. Y. Ins. Co. 8 Johns. 245. See also *ante*, p. 413, n. 5.

[5] Potter *v.* Suffolk Ins. Co. 2 Sumn. 197.

bered that the insurers take upon themselves only so many of these as are "extraordinary."[1] Hence, destruction by worms, is not such a peril as the insurers are liable for, because it is not extraordinary.[2] It is known to exist in all waters; and in certain waters, and at certain seasons, this danger is very great; and it is the duty of the insured to guard against this. But if the vessel, or the cargo — which is far more common — be injured by rats, this has been regarded as so far an extraordinary peril, that, if the insured have taken reasonable precaution against them, the insurers are liable. There is now, however, some disposition to put the danger from rats on the same footing as that from worms.[3]

If a vessel reach a harbor in the course of its voyage, and is therein detained by stress of weather, or by being frozen in, or by any such cause, the expenses of the delay, which may be very considerable, are the loss of the owner, and not of the insurers.[4]

[1] The Schooner Reeside, 2 Sumn. 567, 571. In this case, Mr. Justice *Story* says: "The phrase, 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

[2] Rohl *v.* Pair, 1 Esp. 445; Martin *v.* Salem Ins. Co. 2 Mass. 420; Hazard *v.* N. E. Mar. Ins. Co. 1 Sumn. 218; S. C. 8 Pet. 557.

[3] Hunter *v.* Potts, 4 Camp. 203. In this case, goods were insured on a voyage from London to Honduras, with leave to touch at Antigua. While at the last-named port, her timbers were so damaged by rats that a survey was called, and the vessel condemned. Lord *Ellenborough* held that the underwriters were not liable. See also Aymar *v.* Astor, 6 Cow. 266; Dale *v.* Hall, 1 Wils. 281. In this last case, it was decided that a common carrier was liable for damage caused by rats. And it is fully sustained in a late case in England, Laveroni *v.* Drury, 8 Exch. 166; S. C. 16 Eng. L. & Eq. 510. This was an action against a common carrier for damages caused by rats. The defence was, that the captain had two cats on board. According to the writers on foreign maritime law, this would have been a good defence. See Emerigon, 377, 378; Roccus de Navibus, n. 58; Consulat de la Mer. cc. 66, 67. But the court held that it was no excuse. *Pollock*, C. B., says: "Now, whatever might have been the case when Roccus wrote, we cannot but think that rats might be banished from a ship by no very extraordinary degree of diligence on the part of the master, and we are further very strongly inclined to believe, that, in the present mode of stowing cargoes, cats would afford a very slight protection, if any, against rats. It is difficult to understand how, in a full ship, a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it." If a common carrier is responsible for such a peril, it follows that an underwriter is not. The case of Garrigues *v.* Coxe, 1 Binney, 592, supports the view that an insurer will be liable in such a case, if there be no fault on the part of the captain. Chancellor *Kent* says, (3 Comm. p. 301): "The better opinion would seem to be, that an insurer is not liable for damage done to a ship by rats, because it arises from the negligence of the carrier, and may be prevented by due care, and is within the control of human prudence and sagacity."

[4] Everth *v.* Smith, 2 M. & Sel. 278.

But those incurred by bearing away for repair, fall, as will be more fully stated hereafter, upon the insurers.[1]

If a vessel be not heard from, it will be supposed, after a reasonable interval, that she has perished. The presumption of law will be, that she was lost by an extraordinary peril of the sea, and, of course, the insurers will be answerable for her. But this presumption may be rebutted by any sufficient evidence.[2]

SECTION XV.

OF COLLISION.

Collision is a peril of the sea which may deserve especial notice. In the chapter on Shipping, it has been stated that, where a collision is caused by the fault of one of the ships, the ship in fault sustains the whole loss; that is, it must bear its own loss, and must indemnify the other ship for the injury that ship sustains. It has been held that the insurers of the ship in fault are liable for the whole of this loss, because it is all caused by collision, which is a peril of the sea.[3] But the Supreme Court of the United States have recently decided that the insurers are not held for more than the loss directly sustained by the ship they insure; because they neither insure the ship not in fault, nor do they insure the owners of the ship in fault against mere indebtedness which is cast upon them by the negligence of their servants; for negligence can never be the ground of a claim, although it may be no defence against a claim arising from a peril insured against.[4] This view has been adopted and emphatically approved by the Court of Appeals[5] of New York, reversing a decision of the Supreme Court;[6] and this rule now rests on the weight of authority. The question is one of much difficulty;

[1] See *infra*, p. 481, n. 2.

[2] Brown *v.* Neilson, 1 Caines, 525. In this case, the judge ruled that there was no time fixed by law, after which a missing vessel should be presumed to be lost, but that, if a vessel did not arrive within the most usual limits of the voyage she was prosecuting, she ought to be presumed to be lost, and that it would not be reasonable to calculate on the utmost or greatest limit of it. See also Green *v.* Brown, Strange, 1199; Patterson *v.* Black, Marsh. on Ins. 781; Watson *v.* King, 1 Stark. 121; Twemlow *v.* Oswin, 2 Camp. 85; Cohen *v.* Hinckley, 2 Camp. 51; Houstman *v.* Thornton, Holt, N. P. 242; Koster *v.* Reed, 6 B. & C. 19.

[3] Nelson *et al. v.* Suffolk Ins. Co. 8 Cush. 477.

[4] Gen. M. Ins. Co. *v.* Sherwood, 14 How. 352.

[5] Matthews *v.* The Howard Ins. Co. 9 Kern. 9.

[6] Matthews *v.* The Howard Ins. Co. 13 Barb. 234.

but, upon the whole, we think the rule as now established by the Supreme Court of the Union, and the highest court of our principal mercantile State, rests on the better reason.

The Supreme Court of the United States[1] once confirmed a decision of the Circuit Court for the first circuit,[2] to the effect, that, where a collision takes place without fault, in a port of which the local law divides the whole loss, (therein opposing the general maritime law,) the insurers of a vessel the owners of which, by this law, were made to pay a large sum, were liable for it. But this case was exactly opposed to a cotemporary decision in the Court of Queen's Bench in England;[3] and its authority has certainly been shaken by the recent decision of the Supreme Court of the United States.

SECTION XVI.

OF FIRE.

This peril also must come under the common rule, and the insurers will not be held, unless it be caused by something extraordinary, and not belonging to the inherent qualities of the thing which takes fire.[4]

The master and crew may burn a ship and cargo, to prevent their capture by an enemy; for this is their duty to the State;[5] and, therefore, it would seem that the insurers would be liable for such a destruction by fire, although their policy expressly exempted them from liability for loss by capture, or by war risks generally.

The insurers would be held also for any direct and immediate consequences of the fire; and for loss caused by the endeavor to extinguish it; and, perhaps, for all that arose from, or was due to, honest and reasonable efforts to prevent it.[6] It is, indeed, a general rule, that the insurers are liable for the loss or injury which is the natural, direct, and proximate effect of any peril insured against, although the loss may be the immediate effect of

[1] Peters *v.* Warren Ins. Co. 14 Pet. 99.
[2] Peters *v.* Warren Ins. Co. 3 Sumn. 389.
[3] De Vaux *v.* Salvador, 4 Ad. & El. 420.
[4] See *ante*, p. 442, n. 1.
[5] Gordon *v.* Rimmington, 1 Campb. 123; Pothier, h. t. n. 53; 2 Valin, 75; Emerigon, Tome 1, 434.
[6] See *post*, section on General Average.

a preceding loss; as, if a part of the cargo was burned up, and another part injured by water used to arrest the fire.[1]

SECTION XVII.

OF PIRACY, ROBBERY OR THEFT.

There can be no piracy or robbery, without violence; but this is not necessary to constitute the crime of theft.[2] Piracy and robbery are most usually committed by strangers to the ship; they may, however, be committed by the crew; and the insurers are answerable for such a loss, unless it arose from the fault of the owner.[3] If theft be committed by the crew, we should still hold the insurers liable.[4] This may be doubtful; but insurers regard it as at least possible, and provide against it by the phrase, "assailing thieves." This excludes theft without violence, and, perhaps, all theft by those lawfully on board the vessel, as a

[1] Case *v.* Hartford Ins. Co. 13 Ill. 680. In this case, *Turnbull*, J., says: "Surely, an injury to the goods by water thrown to extinguish a fire, would not be an injury to the goods by actual ignition, and yet, no case can be found where an insurance against damage by fire has been held not to extend to such a case." See also Hillier *v.* Allegheny Co. Mut. Ins. Co. 3 Barr. 470, per *Grier*, J.

[2] It is laid down, by Chancellor *Kent*, (3 Com. 303,) that theft means that which is accompanied with violence, and not simple theft. On this authority, the case of Marshall *v.* Nashville M. & F. Ins. Co. 1 Humph. 99, was decided. In New York, however, after most elaborate arguments, it was held, both by the Supreme Court and the Court of Errors, that the word theft did not mean a stealing by violence necessarily, but would also include a simple larceny. Am. Ins. Co. *v.* Bryan, 1 Hill, 25; S. C. 26 Wend. 563. In this case, the goods had been stolen while on the voyage, but it could not be shown by whom, whether by a passenger, or by one of the crew. The insurers were held liable. See also The Atlantic Ins. Co. *v.* Storrow, 5 Paige, Ch. 285.

[3] Brown *v.* Smith, 1 Dow, 349. In Nayler *v.* Palmer, 22 Eng. L. & Eq. 573; S. C. 8 Exch. 739, insurance was effected on advances for the outfits, provisions, &c., of coolies, to be repaid upon the safe delivery of the emigrants at the port of destination in Peru. The insurance was against pirates, thieves, and all other the usual perils. On the voyage, the coolies rose upon the crew, murdered part of them and the captain, took the ship, and sailed for land; on reaching which they left the ship and escaped. *Pollock*, C. B., says: "The act of seizure of the ship, and taking it out of the possession of the master and crew, by the passengers, was either an act of piracy and theft, and so within the express words of the policy, or, if not of that quality, because it was not done *animo furandi*, it was a seizure *ejusdem generis*, analogous to it, or to barratry of the crew, falling within the general concluding words of the perils enumerated by the policy." The plea averred that the loss occurred through the refusal of the coolies to return to the ship after they landed, and not by reason of the seizure; but the court say: "The running away with the ship was as much the cause of the loss as if the ship had been seized and taken out of the possession of the crew by strangers, and then abandoned, and the cargo had consisted of wild animals, who had escaped or been let loose by them whilst they were in possession, and could not be caught again after the captors abandoned the possession." This case was affirmed, on appeal, in the Exchequer Chamber, 26 Eng. L. & Eq. 455.

[4] See *supra*, n. 2.

part of the ship's company.[1] If, after shipwreck, the property is stolen, the insurers are liable, and would probably be so if there were no insurance against theft, if this was a direct effect of the wrecking.[2]

SECTION XVIII.

OF BARRATRY.

This word has given rise to much discussion, and its meaning may not be now positively determined. We understand by it, however, any wrongful act of the master, officers, or crew, done by them, or either of them, against the owner.[3] If he directed the act, or consented to it, or by his negligence or default caused it,—whether actual owner, or *quasi* owner, by hiring the vessel,—it is no barratry.[4] But it is not necessary that it should be done with an intention hostile to him. For an act otherwise barratrous, would be none the less so because the committer of it supposed it would be for the advantage of the owner. So, too, the voluntary and unnecessary encounter of any extraordinary peril, although done from a belief that it would be advantageous to the owner, would be a barratrous act;[5] and of course it would be if done by the master for his own benefit.[6] Mere negligence, if gross and extreme, may be barratrous, even if there be no pur-

[1] See 1 Phillips on Ins. § 1106.

[2] In Magoun *v.* New Eng. Mar. Ins. Co. 1 Story, 157, 164, Mr. Justice *Story* says: "All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. If there be a capture, and, before the vessel is delivered from that peril, she is afterwards lost by fire, or accident, or negligence of the captors, I take it to be clear that the whole loss is properly attributable to the capture." See also Pothier on Ins. n. 55; Bondrett *v.* Hentigg, Holt, N. P. 149.

[3] Considerable discussion has arisen in regard to the meaning of this word. In nearly all the early cases, it is defined to be a fraud, cheat, or trick on the part of the captain. In The Patapsco Ins. Co. *v.* Coulter, 3 Peters, 222, the whole subject is ably reviewed by Mr. Justice *Johnson*, and the cases, which say that the act must be a fraudulent one, are shown to be inconsistent with the language used in them. Thus, as said in the text, gross negligence will be held to be barratry, and a mere nonfeasance by the captain of the duty enjoined upon him will be a barratrous act, in some cases. See, however, Wiggin *v.* Amory, 14 Mass. 1; Stone *v.* National Ins. Co. 19 Pick. 34; Lockyer *v.* Offley, 1 Term, 259; Vallejo *v.* Wheeler, Cowp. 143; Wilcocks *v.* Un. Ins. Co. 2 Binney, 574; Phyn *v.* Roy, Exch. Ass. Co. 7 Term, 505.

[4] Pipon *v.* Cope, 1 Camp. 434; Nutt *v.* Bourdieu, 1 Term, 323, 330, per Lord *Mansfield*, C. J.; Vallejo *v.* Wheeler, Cowp. 155; Soares *v.* Thornton, 7 Taunt. 627.

[5] In Earle *v.* Rowcroft, 8 East, 126, the master had general instructions to make the best purchases with despatch. It was held that this would not justify his trading with the enemy, and that such an act would be barratry.

[6] Vallejo *v.* Wheeler, Cowp. 143; Ross *v.* Hunter, 4 Term, 33.

pose of helping or of hurting any one.[1] And, indeed, mere nonfeasance, or the not doing of an act, may be barratrous, if thereby an injury was sustained, which might have been prevented by a proper and reasonable resistance, and therefore should have been so prevented.[2]

It must be an act *against* the owners. Therefore, if the master be a part-owner, he cannot commit barratry.[3] Nor will any act of a master be barratrous, which is done by him as supercargo, consignee, or factor, or in any capacity or function whatever, other than that of master.[4]

Not only is a *quasi* owner's consent to an act destructive of its barratrous character, but his consent will have this effect, and the legal owner's will not. Thus, if there be a *quasi* owner, as a charterer who loads and sails her, the master, however, being appointed by the actual owner,—if this master commits an act of barratry, its character is not taken away by the fact that he did it with the consent, or by the order of the actual or legal owner.[5]

The master being appointed by the owner, and controlled by him, many policies provide that they do not insure against barratry, if the insured be the owner of the ship. The purpose of

[1] In the case of Heyman *v.* Parish, 2 Camp. 149, the captain sailed contrary to the directions of the pilot, and the ship having been stopped by getting out an anchor, the captain cut the cable, and let her drift on a rock. *Park*, for the defendant, suggested that there did not appear to be any fraud. Lord *Ellenborough* said: "This is not necessary. It has been solemnly decided, that a gross malversation by the captain in his office, is barratrous." See also Richardson *v.* Maine Ins. Co. 6 Mass. 117, 121; Goldschmidt *v.* Whitmore, 3 Taunt. 508.

[2] In The Patapsco Ins. Co. *v.* Coulter, 3 Peters, 234, Mr. Justice *Johnson* says: "And, certainly, a master of a vessel who sees another engaged in the act of scuttling or firing his ship, and will not rise from his berth to prevent it, is *primâ facie* chargeable with barratry. Although a mere misfeasance, it is a breach of trust, a fault, an act of infidelity to his owners." See n. 3, p. 447.

[3] Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 39; Taggard *v.* Loring, 16 Mass. 336; Cook *v.* Ins. Co. 11 Johns. 40. In Jones *v.* Nicholson, 26 Eng. L. & Eq. 542, it was held, that though an owner could not commit barratry, yet a part-owner could.

[4] Emerigon, Meredith's ed. p. 296. The act, however, if done by the master in his capacity of master, although he may fill other offices, will be barratry.

[5] Vallejo *v.* Wheeler, Cowp. 143; S. C. Lofft, 631; and in a note to 1 Johns. 234. See also Boutflower *v.* Wilmer, 2 Selw. N. P. 11th ed. 969. The question which most frequently arises, in such cases, is, who is the owner for the voyage. It was held in England, in Hutton *v.* Bragg, 7 Taunt. 14, that if the charter-party contained words of demise, the possession of the vessel passed thereby to the charterers, though there were words repugnant to this construction in other parts of the instrument. This case has been overruled in England, in Christie *v.* Lewis, 2 Brod. & Bing. 410, where it was held that the whole contract must be taken together. In this country, Hutton *v.* Bragg, has nowhere been followed. The law is stated with great accuracy in Marcardier *v.* The Chesapeake Ins. Co. 8 Cranch, 49, "where the general owner retains the possession, command, and navigation, and contracts to carry the goods on freight, the charter-party is a mere affreightment sounding in covenant." See also M'Intire *v.* Browne, 1 Johns. 229. See *ante*, chapter on Shipping, p. 359, n. 2.

this is obvious; it is to prevent an insurance of the owner against the acts of one for whom he ought to hold himself responsible. The effect of the clause is, generally, to limit the insurance against barratry, to goods shipped by one who is not owner of the vessel. Still, if a charterer who filled the ship he hired with his own goods and those of others, insured his freight — meaning the excess of what he would earn over what he must pay — the insurance against barratry would not be prevented by this clause from extending to him, because he is not the owner of the ship.

As a general rule, the insurers are liable for the misconduct of the crew, when all usual and reasonable precautions have been taken by the owner, and his servant, the master, to prevent such misconduct.[1]

SECTION XIX.

OF CAPTURE, ARREST, AND DETENTION.

The phrase which refers to these perils, is usually in these words: "Against all captures at sea, or arrests, or detentions of all kings, princes, and people." Almost every word of this sentence has been the subject of litigation or of discussion. The provision has been held to apply not only to captures, arrests, or detentions by public enemies, by foreign belligerent powers,[2] but to those by the very government of which the insured is himself a subject, *unless* the same be for a breach of the law by the insured.[3] By the "people" are understood the sovereign power of a State, whatever be its form of government.[4] "Capture" and "seizure" are equivalent—they differ from "detention" in this respect; the two former words mean a taking with intent to

[1] *Supra*, p. 442, n. 2.

[2] Rhinelander *v.* The Ins. Co. of Penn. 4 Cranch, 29.

[3] Green *v.* Young, 2 Salk. 444; S. C. 2 Ld. Raym. 840; Odlin *v.* Ins. Co. of Penn. 2 Wash. C. C. 312; Lorent *v.* S. Car. Ins. Co. 1 Nott & McCord, 505; M'Bride *v.* Mar. Ins. Co. 5 Johns. 299; Olivera *v.* Un. Ins. Co. 3 Wheat. 183; Rotch *v.* Edie, 6 Term, 413; Ogden *v.* N. Y. F. Ins. Co. 10 Johns. 177.

[4] In Nesbitt *v.* Lushington, 4 Term, 783, 787, Lord *Kenyon* says: "The meaning of the word "people" may be discovered here, by the accompanying words: *noscitur a sociis*—it means 'the ruling power of the country.'" Mr. Justice *Buller* says: "It means 'the supreme power;' 'the power of the country,' whatever it may be."

keep; the latter, a taking with intent to restore the property.[1] "Arrest," is any taking possession of the property for any hostile or judicial purpose.[2]

SECTION XX.

OF THE GENERAL CLAUSE.

This clause has a very limited operation. We have already remarked, that it is usually restricted to perils of a like kind with those already enumerated; and although this phrase has been declared to be substantial and material,[3] it might be difficult to hold an insurer liable on tenable grounds, under this clause, when he would not have been liable under any of the enumerated perils.[4] Another phrase sometimes used, "against all risks," has been construed very widely, and as if it included every cause of loss, except the fraud of the insured.[5] If it stood by itself, it might be difficult to define it; but if it followed the usual enumeration, we should say that it should be limited by them in its significance and operation.[6]

[1] Emerigon, c. xii., § xxx., p. 420, Meredith's ed.

[2] Lord *Ellenborough* held, in Carruthers *v.* Gray, 3 Camp. 142, that an averment stating that a ship and goods were arrested by the powers of government at a certain place, and the goods were there detained and confiscated, was supported by proof that the goods were forcibly taken possession of by the officers of government. In Olivera *v.* The Union Ins. Co. 3 Wheat. 183, Mr. Chief Justice *Marshall*, speaking of arrest and detainment, says: "Each of these terms implies possession of the thing, by the power which arrests or detains." He accordingly held that a blockade could not be either of these, because the vessel remained in the possession of the master,—but that it would be a restraint.

[3] In Cullen *v.* Butler, 5 M. & S. 461, Lord *Ellenborough*, speaking of the words in the general clause, says: "They are entitled to be considered as material and operative words, and to have their due effect assigned to them in the construction of this instrument."

[4] Moses *v.* The Sun Mut. Ins. Co. 1 Duer, 159. It was held in this case, that the general clause covered only losses of a similar nature to those specifically described, and that it would not therefore cover a loss resulting from the consumption of cargo by the crew or passengers, or from a sale of it to defray the necessary expenses of repairing the vessel. See also cases cited *ante*, note 226.

[5] In Goix *v.* Knox, 1 Johns. Cas. 337, the court said: "This expression is vague and indefinite, but if we allow it any force, it must be considered as erecting a special insurance, and extending to other risks than are usually contemplated. We are inclined to apply it to all losses, except such as arise from the fraud of the assured." See also Skidmore *v.* Desdoity, 2 Johns. Cas. 77.

[6] The maxim *noscitur a sociis* would seem to apply as well here, as in Nesbitt *v.* Lushington, 4 Term, 783, 787, where it was held that the word "people," was to be taken in connection with the context, and it was accordingly construed to mean the sovereign power of the State. See also cases cited *ante*, p. 440, n. 3.

SECTION XXI.

OF PROHIBITED TRADE.

This is not the same with contraband trade, although the words are sometimes used as if they were synonymous. It is perfectly lawful for a ship to break through a blockade if it can, or to carry arms or munitions of war to a belligerent. But then it is perfectly lawful for the State whose enemy is thus aided, to catch, seize, and condemn the vessel that does this, if it can. The vessel takes upon itself this risk; and we have seen that it is not covered by a common policy, unless the purpose is disclosed and permitted.[1] Prohibited trade belongs to a time of peace. It is either trade prohibited by the State to which the ship belongs,—and then it is wholly illegal,—and the insurers are not only not answerable under a general policy for a loss occasioned by this breach of law, but an express bargain to that effect would itself be illegal and void;[2] or it may be trade prohibited only by a foreign State. And then it is not an illegal act in the vessel by whose sovereign it is not prohibited. On general principles, we should say, that the intention to incur this risk should be communicated.[3] But in practice, our policies generally, if not universally, except expressly the risks arising from prohibited trade.

If there has actually been such a trade, and a seizure, forfeiture, and condemnation because of it, the insurers are certainly discharged by the operation of this exception.[4]

If there has been an attempt at such a trade, which was not carried into effect, but the vessel was seized and condemned

[1] See *ante*, p. 417, n. 6.

[2] The United States *v.* The Paul Shearman, 1 Peters, C. C. 98; Delmada *v.* Motteux, Park on Ins. 505, 544; Russell *v.* Degrand, 15 Mass. 35; Richardson *v.* The Maine Ins. Co. 6 Mass. 102.

[3] In Archibald *v.* Mercantile Ins. Co. 3 Pick. 70, the court say: "The law is clearly settled, that an insurance does not cover an illegal voyage, unless by the terms of the contract the intention to do so is expressed, or unless the voyage insured is known to the assurer to be illegal at the time when he makes the contract." In this case, the risk was a prohibited one. See also Andrews *v.* The Essex F. & M. Ins. Co. 3 Mason, 6; Richardson *v.* The Maine Ins. Co. 6 Mass. 102; Livingston *v.* The Maryland Ins. Co. 7 Cranch, 506; Pollock *v.* Babcock, 6 Mass. 234.

[4] See cases cited in note above.

therefor, according to the laws of the country where the attempt was made, here, also, we should say, that the insurers were discharged.[1]

If, however, the seizure and condemnation were for an alleged trade, or attempt to trade, but there was no justification for the same, in fact, the vessel being wholly innocent, such a loss as this would not come under the exception, and the insurers would be liable.[2]

If there be such a trade, or attempt thereto, and no seizure or condemnation, the insurers are not discharged from their liability for an independent loss, by this exception.[3]

The parties may always agree to add such risks or except such as they choose.[4] And sometimes an excepted risk and one insured against are mingled. If, for example, all war risks and all captures are excepted, and a vessel is stranded upon a foreign and hostile shore, and captured there and condemned, are the insurers liable? Yes, if the vessel would have been lost by the stranding; but not, if so far as this peril went, the owners would have recovered her.[5]

[1] But if at the time of the seizure, the port to which the vessel was going had ceased to be hostile, or another port had been substituted for it, then the capture is invalid. The Abby, 5 Rob. 251; The Imina, 3 Rob. 167; The Trende Sostre, 6 Rob. 390, n.

[2] Sawyer *v.* The Maine F. & M. Ins. Co. 12 Mass. 291.

[3] In Richardson *v.* Maine Ins. Co. 6 Mass. 112, *Parsons*, C. J., says: "And if the assurer will expressly insure against seizure for illicit trade, or with a full knowledge of the nature of the voyage, he will insure it without making any exception, he will be bound to indemnify the assured for the losses arising from the breaches of the trade-laws of the foreign State. But although he may not take upon himself these losses, and thus be irresponsible for them, yet he is answerable for any other losses insured against, because the policy is not void."

[4] "It is a maxim as old as our law, *conventio vincit legem*. The parties may, if they please, introduce into their contract an article to prevent the application of a general rule of law to it." Per Lord *Kenyon*, C. J., in Walker *v.* Birch, 6 Term, 262.

[5] The case of Livie *v.* Janson, 12 East, 648, where a ship insured, warranted free from American condemnation, was driven on shore by perils insured against, and afterwards captured, proceeds upon this distinction. Lord *Ellenborough*, in giving the opinion of the court, states this case: "If, for instance, a ship meet with sea damage, which checks her rate of sailing, so that she is taken by an enemy, from whom she would otherwise have escaped, though she would have arrived safe but for the sea damage, the loss is to be ascribed to the capture and not to the sea damage." This case is said by an eminent writer on Insurance, to be "surely wrong"—(see 1 Phillips on Ins. § 1136)—but it appears to us to come clearly within the rule laid down in the text. If the decision is wrong, it is not a mistake of law, but one of fact, as is said by *Best*, C. J., in Hahn *v.* Corbett, 2 Bing. 205, because the facts would have warranted the court in finding that the stranding produced a total loss independently of the seizure. In the case of Rice *v.* Homer, 12 Mass. 230, the ship was damaged to the amount of three fourths of her value, but as she existed in specie, there could not be a total loss before an abandonment should be made; and, consequently, as there was no total loss before seizure, the capture was held to be the cause. See also Green *v.* Elmslie, Peake, 212.

SECTION XXII.

OF DEVIATION.

As the insurers must know, either from information given them or from the known course of trade, what risks they assume, it is obvious that the insured have no right to change those risks, and that if they do, the insurers are not held to the new risk. Such a change of risk is called a deviation; it certainly discharges the insurers; and although the word originally meant in law what it means commonly, a departure from the proper course of the voyage, it now means, in the law of insurance, any departure from, or change of the risks insured against. And it discharges the insurers, although it does not increase the risk, as they have a right to stand by the bargain they have made.[1] There may be a deviation while the ship is in port;[2] or where the insurance is on time, and no voyage is indicated.[3] And a very slight deviation may suffice to discharge the underwriters.[4]

But no deviation discharges the insurers, or, in the language of the law, no change of risk is a deviation, unless it be voluntary—that is, unless it be made without sufficient necessity.[5] Nor is this necessity determinable altogether by the event; for it must be judged of by the circumstances as they existed at the time, and entered into, or ought to have entered into consideration.[6]

If a deviation is only temporary, it only suspends the liability

[1] Maryl. Ins. Co. *v.* Le Roy, 7 Cranch, 26. In this case, Mr. Justice *Johnson* says: "The discharge of the underwriters from their liability, in such cases, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance."

[2] Palmer *v.* Marshall, 8 Bing. 79. In this case, the risk commenced "at" the port of departure. It was held that an inexcusable delay to sail would be a deviation. See also Palmer *v.* Fenning, 9 Bing. 460; Earl *v.* Shaw, 1 Johns. Cas. 313; Seamans *v.* Loring, 1 Mason, 127; Grant *v.* King, 4 Esp. 175, per Lord *Ellenborough*.

[3] ——— *v.* Westmore, 6 Esp. 109; Bell *v.* Western F. & M. Ins. Co. 5 Rob. La. 423.

[4] Maryland Ins. Co. *v.* Le Roy, 7 Cranch, 26. See also cases *passim*.

[5] Thus it is allowable to go out of the course to avoid capture. Oliver *v.* Maryl. Ins. Co. 7 Cranch, 487; and to avoid ice—Graham *v.* Com. Ins. Co. 11 Johns. 352. See also Vallejo *v.* Wheeler, Cowp. 143; Green *v.* Elmslie, Peake, 212; Robinson *v.* Mar. Ins. Co. 2 Johns. 89; Lee *v.* Gray, 7 Mass. 349.

[6] Byrne *v.* Louisiana State Ins. Co. 19 Martin, (7 N. S.) Louis. 128; Gazzam *v.* Ohio Ins. Co. Wright's Ohio Rep. 202; Toulmin *v.* Inglis, 1 Camp. 421.

of the insurers. But it is not temporary, unless after its termination all other risks are precisely what they would have been if there had been no deviation.[1] And this is true of very few deviations indeed, and certainly not of any change of course; for the ship will not be again in the same place, and subject to the same winds and waves, as she would otherwise have been.[2]

The proper course—a departure from which is a deviation—is always the usual course, provided there be a usage; for a master is not bound to follow their track, wherever one or two have gone before, but must be allowed his own reasonable discretion.[3] If there be no course so well established that every one would be expected to follow it, the master must go to his destined port in the most natural, direct, safe, and advantageous way. And a mere mistake on this point does not constitute a deviation. A deviation from one course marked out by established usage, is not, however, excused by a mistake.[4] And if a master, where there is no controlling usage, has made up his mind that a certain course is the best and proper course, and takes another, whether from some motive of his own or by the order of his owner, this is a deviation. The insurers have a right to the master's best discretion, and to his following it.[5]

An extraordinary and unnecessary protraction of a voyage would be a deviation. But the mere length of the voyage, without other evidence, would not prove this.[6]

Liberty policies, so called, are often made. That is, the insured is expressly permitted to do certain things, which, without such permission, would constitute a deviation. And a large proportion of the cases on the subject of deviation, has arisen under

[1] See 1 Phillips, §§ 975, 989.

[2] Coffin *v.* Newburyport Mar. Ins. Co. 9 Mass. 436, 449. Mr. Justice *Sedgwick*, in delivering the opinion of the court, in this case, says: "Now it is undoubtedly true, that the shortness of the time, or the distance of a deviation, makes no difference as to its effect on the contract—whether for one hour or one month, or for one mile or one hundred miles, the consequence is the same. If it be voluntary, and without necessity, it puts an end to the contract."

[3] Martin *v.* Del. Ins. Co. 2 Wash. C. C. 254.

[4] Phyn *v.* The Royal Exch. Ass. Co. 7 Term, 505. This follows as a natural sequence of the rule above laid down, that the usual course, if there be one, is to be followed, and if this is not done, the risk is a different one from that concerning which the contract was made, and consequently the insurers will be discharged. See Maryland Ins. Co. *v.* Le Roy, 7 Cranch, 26.

[5] Middlewood *v.* Blakes, 7 Term, 162; Vallejo *v.* Wheeler, Cowp. 143; Ross *v.* Hunter, 4 Term, 33.

[6] Syers *v.* Bridge, Doug. 529; Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383; Smith *v.* Surridge, 4 Esp. 25; Suydam *v.* Marine Ins. Co. 2 Johns. 138, 143.

these policies. Most of the phrases commonly used have been construed by the courts, and generally quite strictly. A liberty to "enter" a port, or "touch" at a place, permits a ship to go in and come out with but little delay, because for this purpose the word "stay" or "remain," is necessary.[1] And it is said that even to "enter and stop at," gives no liberty to trade at the port, but that word itself, or its full equivalent, must be used. Still the circumstances of each case would influence the court very strongly in construing any such phrase or permission.[2]

It is certain that no permission is necessary for any change of course or risk that is made for the saving of life, or even for the purpose of helping the distressed.[3] Always provided, however, that the change of course, or the delay, was no greater and no longer continued than this cause for it actually and rationally considered, required. And the rule applies to every case in which it is attempted to justify a deviation on the ground of necessity.[4] It is, however, equally well settled that a change of course or of risk for the purpose of saving property, is a deviation not justified by its cause.[5]

Sometimes it is intended that a ship shall visit many ports, and even go backwards and forwards, at places between the port

[1] Urquhart *v.* Barnard, 1 Taunt. 450. Sir J. *Mansfield*, C. J., in delivering the opinion of the court in this case, says: "It is doubtful, nor can I find it anywhere defined, what is the precise meaning of 'liberty to touch,' as contradistinguished from the meaning of 'liberty to touch and stay.' No case decides this difficulty, though there must be some difference between the two phrases." See also, Duerhagen *v.* U. S. Ins. Co. 2 S. & R. 309. So it has been held that liberty to touch at one port will not authorize the substitution of another port, though the latter was not more out of the course. The better opinion now seems to be that where a ship is rightly at a port, any thing can be done there which will not delay her or increase the risk. Raine *v.* Bell, 9 East, 195; Kane *v.* Col. Ins. Co. 2 Johns. 264; Hughes *v.* Union Ins. Co. 3 Wheat. 159; Thorndike *v.* Bordman, 4 Pick. 471; Chase *v.* Eagle Ins. Co. 5 Pick. 51; Cormack *v.* Gladstone, 11 East, 347; Laroche *v.* Oswin, 12 East, 131.

[2] Ashley *v.* Pratt, 16 M. & W. 471; S. C. 1 Exch. 257; Metcalfe *v.* Parry, 4 Camp. 123; Houston *v.* New England Ins. Co. 5 Pick. 89. See also, cases *supra*.

[3] Bond *v.* Brig Cora, 2 Wash. C. C. 80; Lawrence *v.* Sydebotham, 6 East, 54, per *Lawrence*, J. In the case of The Schooner Boston, 1 Sumner, 328, Mr. Justice *Story* says: "The stopping for this purpose could not, in my judgment, be deemed by any tribunal in Christendom a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby. See also, The Ship Henry Ewbank, 1 Sumner, 400; Settle *v.* St. Louis. Perpet. M. & F. Ins. Co. 7 Missouri, 379; Walsh *v.* Homer, 10 Missouri, 6. And a deviation to save lives on board is also justifiable; but the plaintiff is bound to show that all medicines, &c., generally necessary for the voyage were on board, but were insufficient in the emergency. Woolf *v.* Claggett, 3 Esp. 257.

[4] Lavabre *v.* Wilson, Doug. 290, per Lord *Mansfield*.

[5] Bond *v.* Brig Cora, 2 Wash. C. C. 80; Mason *v.* Ship Blaireau, 2 Cranch, 240; Warder *v.* Goods Saved from La Belle Creole, 1 Peters, Adm. 40; Natchez Ins. Co. *v.* Stanton, 2 Sm. & Mar. 340.

from which she sails, and that at which the voyage is finally to terminate. Such purposes as this are sometimes provided for by a policy on time; and sometimes by express permission to go to and trade at certain ports. But there must be no going back and forth unless this also is expressly stated. Otherwise, the ports mentioned must be visited in a certain order. If a port is named as one to which the ship will go, to that she must go. If it be only said that she may go to it, she may pass by without entry. If permission be given to enter and stop at a dozen different ports, the vessel may omit any of them or the whole, but must visit in the proper order all to which she goes.[1]

What this order is, must be determined by the words used, and by the facts, in each case. Generally, if ports are enumerated, they must be visited in the order in which they are mentioned; or if it appears that this was not intended, then in their geographical order, which may not be that which the map indicates, but that settled by the course of navigation.[2] Where no final port is designated, it would seem that the ports permitted may be visited in any order; but even here the voyage cannot be unreasonably protracted.[3]

The substitution of a new voyage for that agreed upon, is of course a deviation, and that can very seldom be justified by any necessity so as to carry the insurers liability on the new voyage. If an entirely new voyage is intended, and a vessel sails upon it, but in the same direction in which she would have gone on the insured voyages, the policy never attaches, and the premium is never earned, because the ship never sails on the insured voyage.[4] But if the ship is intended to pursue the insured voyage to its proper terminus, but at a certain point of the voyage to deviate by going into another port, there is no deviation until that point is reached and the deviation actually begun; because it is certain that no mere intention to deviate dis-

[1] Andrews *v.* Mellish, 5 Taunt. 496; Marsden *v.* Reid, 3 East, 572; Kane *v.* Columbian Ins. Co. 2 Johns. 264; Hale *v.* Mercantile Ins. Co. 6 Pick. 172; Houston *v.* New England Ins. Co. 5 Pick. 89.

[2] In Beatson *v.* Haworth, 6 Term, 531, Lord *Kenyon* held that, where the geographical order was different from that named in the policy, the latter must be followed, unless a usage could be shown to the contrary. Where a usage can be shown, it will govern. Gairdner *v.* Senhouse, 3 Taunt. 16; Bragg *v.* Anderson, 4 Taunt. 229. See also Ashley *v.* Pratt, 16 M. & W. 471; 1 Exch. 257.

[3] Deblois *v.* Ocean Ins. Co. 16 Pick. 303; Gairdner *v.* Senhouse, 3 Taunt. 16.

[4] Marsden *v.* Reid, 3 East, 572; Wooldridge *v.* Boydell, Doug. 16; Palmer *v.* Marshall, 8 Bing. 79; Palmer *v.* Fenning, 9 Bing 460

charges the insurers until it is carried into execution.[1] Whether the intended deviation was only that, or was so great a change of the voyage that the mere intention to make it was an intention to sail on an entirely different voyage, in which case the policy does not attach, would be in every case a question of mixed law and fact. And if it was a part of the intention not to go finally to the proper terminus of the voyage, this would generally, we think, indicate that the old voyage was given up and a new one substituted.[2]

SECTION XXIII.

OF THE TERMINI OF THE VOYAGE, AND OF THE RISK.

These must be distinctly stated, whether they be termini of time or place. A policy from ——— to ———, or from B to ———, or from ——— to B, is void.[3] Nor would it be any better if the termini were named with apparent distinctness, but in such wise as to mean nothing, or nothing sufficiently certain.[4]

A policy takes effect from its date, if the bargain was then complete, although not delivered until afterwards.[5] And it may be remarked that if there be an unreasonable delay in the sailing of the vessel, the policy never attaches, for the bargain is considered as annulled.[6]

The common phrase "lost or not lost," or any equivalent words, make the policy retrospective, so far that the insurers are responsible for any loss which occurred before the policy was made, but within the time or the voyage insured.[7] If the loss be known, it must of course be stated; but even then, if its extent or amount is wholly unknown, it may be the subject of valid insurance.[8] If the policy is to take effect "on" a certain

[1] Houston *v.* New Eng. Ins. Co. 5 Pick. 89; Firemen's Ins. Co. *v.* Lawrence, 14 Johns. 46, per *Kent*, Chancellor; Hogg *v.* Horner, Park on Ins. 626, 782; Henshaw *v.* Mar. Ins. Co. 2 Caines, 274; Hobart *v.* Norton, 8 Pick. 159; Hare *v.* Travis, 7 B. & C. 14.

[2] Tasker *v.* Cunninghame, 1 Bligh, 87; Middlewood *v.* Blakes, 7 Term, 162.

[3] Molloy, book 2, c. 7, § 14. See also, Manly *v.* United Mar. and Fire Ins. Co. 9 Mass. 85.

[4] Robertson *v.* French, 4 East, 130; Langhorn *v.* Hardy, 4 Taunt. 628; Spitta *v.* Woodman, 2 Taunt. 416; Graves *v.* The Marine Ins. Co. 2 Caines, 339; Richards *v.* The Marine Ins. Co. 3 Johns. 307.

[5] Lightbody *v.* North Am. Ins. Co. 23 Wend. 18. See also, The Union Mut. Ins. Co. *v.* The Commercial Mut. Ins. Co. *ante*, p. 403, n. 3.

[6] See *ante*, p. 453, n. 2.

[7] See *ante*, p. 414, n. 1.

[8] Mead *v.* Davison, 3 Ad. & Ellis, 303.

day, it begins with the beginning of that day. If "from and after" a day, that day is excluded, but "from" only may be more ambiguous, and the construction of the word be open to evidence. It has been said, however, that "from the date," includes the day, and "from the day of the date," excludes it; but this is a very nice distinction.[1]

A policy on a vessel "at" such a place, generally attaches when she is there and in safety.[2] But if there were a policy "to" a place, and another was made out between the same parties "from" the same place, we should say that the law would presume that the parties intended that the second policy should attach whenever the first one ceased by her arrival, without reference to the condition of the ship or her peril at the time.[3]

Generally, a policy on goods attaches to them when it would have attached to the vessel had she been insured. And if the risk is to begin at a certain time, and also at a certain port or place, the latter words may be shown to be mere surplusage, and not intended to control the former; and the risk will begin at that time wherever the ship may be.[4] The extent which should be given to the meaning of the word "port" is sometimes a question of some difficulty; but in general all places are within a port which belong to it by mercantile usage and acceptance, although not within the same municipal or legal precinct.[5]

[1] Sir Robert Howard's Case, 2 Salk. 625. This subject was elaborately considered by Lord Mansfield, in Pugh *v.* Duke of Leeds, Cowper, 714. He held that the word "from" might be either inclusive or exclusive, according to the context and subject-matter. He also held that the day, and the day of the date meant in every case the same thing. He says: "The date is a memorandum of the day when the deed was delivered. In Latin it is '*datum*;' and '*datum tali die*' is, delivered on such a day. Then in point of law, there is no fraction of a day; it is an indivisible point. What is 'the day of the date?' It is 'the day the deed is delivered.' 'The date,' therefore, being also defined to be the day the deed is delivered; 'the date,' and 'the day of the date,' must mean the same thing, The day of the date is only a superfluous expression."

[2] In Parmeter *v.* Cousins, 2 Camp. 235, the insurance was at and from the Island of St. Michael's. The ship arrived in a very disabled state, and, after lying at anchor there twenty-four hours, was blown out to sea and wrecked. Lord Ellenborough held that the policy under these circumstances never attached. He says: "She must have once been at the place in good safety. If she arrived at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches."

[3] See Spitta *v.* Woodman, 2 Taunt. 416; Bell *v.* Hobson, 16 East, 240; 1 Arnould on Ins. p. 427; 3 Kent, Com. 310.

[4] Manly *v.* Unit. M. & F. Ins. Co. 9 Mass. 85; In Martin *v.* The Fishing Ins. Co. 20 Pick. 389, a vessel was insured "at and from Calais, Maine, on the 16th day of July, at noon, to, at, and from all ports and places to which she may proceed in the coasting business, for six months." The court held that the policy attached, although there was no evidence that the vessel was at or prosecuting her voyage from Calais on the day named.

[5] See Park *v.* Hammond, 2 Marsh, 189; Payne *v.* Hutchinson, 2 Taunt. 405, n.;

"At and from" cover a vessel in a port as well as after she leaves it. "From" only covers the vessel *after* she gets under way. "At and from" applied to goods, do not cover them in the port until they become subject to marine risk, by being waterborne.[1] They are covered not only when they reach the ship, but as soon as they are put on board of boats or lighters or any other usual water conveyance to the ship.[2] And if insured to a port, they continue covered after they leave the ship by any usual conveyance for the shore.[3] The word "at" applied to an island or a coast, may embrace all the ports therein, and cover the ship while sailing from one to another.[4] "To a port and a market," covers a voyage to the port, and thence to every place to which, by mercantile usage or reasonable construction, a ship may go thence in search of a market. If the insurance be on a certain voyage, a very strong presumption of law would confine it to the next voyage which came under that description.[5]

If the insurance be to "a port of discharge," this does not terminate if the vessel goes to a port for inquiry, or for needful refreshment or repair.[6] If it be "a final port of discharge," the

Constable *v.* Noble, 2 Taunt. 403; Murray *v.* Col. Ins. Co. 4 Johns. 443. And see *infra*, n. 4.

[1] Spitta *v.* Woodman, 2 Taunt. 416. And where the risk is to commence "in the loading of goods" at A, the policy will not cover goods shipped before the arrival of the vessel at A. Mellish *v.* Allnutt, 2 M. & S. 106; Langhorn *v.* Hardy, 4 Taunt. 628; Horneyer *v.* Lushington, 15 East, 46; Rickman *v.* Carstairs, 2 Nev. & Man. 571. See also, Graves *v.* Mar. Ins. Co. 2 Caines, 339; Scriba *v.* Ins. Co. of N. H. 2 Wash. C. C. 107. In Murray *v.* Col. Ins. Co. 11 Johns. 302, it was held that the hoisting the cargo out of the hold of the ship, and restoring it, did not amount to a loading it on board the ship.

[2] Parsons *v.* Mass. F. & M. Ins. Co. 6 Mass. 197; Coggeshall *v.* Am. Ins. Co. 3 Wend. 283. In this case, the vessel was on a trading voyage on the western coast of South America. The policy covered goods laden on board said vessel from the 10th of July to the 10th of January. During this time a basket of virgin silver was lost, while being brought from the shore to the vessel, in a flat boat. *Held*, that this being the customary mode of taking goods on board, the assured were entitled to recover.

[3] Per Lord *Mansfield*, C. J., in Hurry *v.* Royal Exch. Ass. Co. 2 B. & Pul. 430; Rucker *v.* London Ass. Co. 2 B. & Pul. 432, note; Sparrow *v.* Carruthers, 2 Str. 1236; Matthie *v.* Potts, 3 B. & P. 23; Wadsworth *v.* Pac. Ins. Co. 4 Wend. 33; Stewart *v.* Bell, 5 B. & Ald. 238.

[4] Cruikshank *v.* Janson, 2 Taunt. 301; Dickey *v.* Baltimore Ins. Co. 7 Cranch, 327.

[5] Maxwell *v.* Robinson, 1 Johns. 333; Deblois *v.* Ocean Ins. Co. 16 Pick. 303. In this case, the court say: "The words, and a market, seem to us necessarily to confer the liberty of returning to a port, once and again, if such return were with the honest intent of finding a market." See also, Neilson *v.* De La Cour. 2 Esp. 619.

[6] Coolidge *v.* Gray, 8 Mass. 527; Lapham *v.* Atlas Ins. Co. 24 Pick. 1. In Brown *v.* Vigne, 12 East, 283, Lord Ellenborough used this language, in speaking of a similar case: "There may be causes for a ship putting back for a time, without any intention of abandoning her voyage; as the approach of an enemy, or a temporary embargo; or as in a case which occurred before Lord Kenyon, where a ship, bound to a port in the Baltic, found it, on her approach, blocked up by the ice; on which she put back, but afterwards, on a thaw, sailed again, and Lord Kenyon held, that she was still under the

insurance ceases upon such parts of the cargo as are left at one port or another, and continues on the ship, and on all the goods on board, until arrival at the port, where they will be finally discharged.[1]

A vessel is "at sea," when in bays or straits; and indeed, by a rather broad construction whenever not "in port." And if the insurance begins on a ship on a certain day "if at sea," this has been construed to mean "if not at home," and therefore to attach if the ship was in a distant port.[2]

The English policies and our own contain a provision that the insurance continues on the ship "until she shall be arrived and moored twenty-four hours in safety;" and on the goods until they be "landed," or "safely landed."

Under this clause, the ship is insured until moored in safety, so far as the perils insured against are concerned, but not against the peculiar and local dangers of the port, or the possibility that a tempest there might injure her, for these always exist. If she enters the harbor, and before she is moored, is blown off, or ordered into quarantine, she is insured until this delay ceases and

policy." See also, Longhorn *v.* Allnutt, 4 Taunt. 511; Rucker *v.* Allnutt, 15 East, 278; Hammond *v.* Reid, 4 B. & Ald. 72; Motteux *v.* Lond. Ass. Co. 1 Atk. 545; Cruder *v.* Phil. Ins. Co. 2 Wash. C. C. 262; Winthrop *v.* Un. Ins. Co. 2 Wash. C. C. 7; King *v.* Middletown Ins. Co. 1 Conn. 184; Sage *v.* Middletown Ins. Co. 1 Conn. 239.

[1] Inglis *v.* Vaux, 3 Camp. 437; Moore *v.* Taylor, 1 Ad. & El. 25; Oliverson *v.* Brightman, 8 Ad. & El. N. S. 781; Bold *v.* Rotheram, id. 797. In Upton *v.* The Salem Ins. Co. 8 Met. 605, insurance was effected on a vessel from Salem to her port or ports of discharge in the River La Plata. She discharged all her cargo, with the exception of a few bundles of shingles at Monte Video, and then sailed for Buenos Ayres, where she was lost. The court held that if the cargo was substantially discharged at Monte Video, the underwriters would not be liable, and that this was a question for the jury to decide.

[2] In Wood *v.* N. Eng. Mar Ins. Co. 14 Mass. 31, the vessel, at the expiration of the year, was in a foreign port, where she had been carried after capture by a British cruiser, *Parker*, C. J., said: "A vessel is considered in that condition," (viz. at sea,) "while on her voyage and pursuing the business of it, although during a part of the time she is necessarily within some port, in the prosecution of her voyage. The intention, in prolonging the risk beyond twelve months, was unquestionably to give the ship protection under the policy, in case that time should expire, while the vessel should be employed in some unfinished voyage; and whether in a foreign port, or actually upon the high seas, we believe there was no difference in the contemplation of the parties, when the contract was made." In Bowen *v.* The Hope Ins. Co. 20 Pick. 275, *Shaw*, C. J., says: "If the vessel has sailed or commenced a voyage from one port to another, she must be considered to be at sea, within the meaning of this clause, from the commencement to the termination of that voyage, although during part of it she may have sought shelter in a place on the way. Then what is a departure on a voyage and what an arrival must be settled by the law and usage as established in reference to cases where the *termini* of the voyage, and not periods of time, determine the commencement and termination of the risk. See also, on this subject, Union Ins. Co. *v.* Tysen, 3 Hill, 118; Eyre *v.* Marine Ins. Co. 6 Whart. 247; Burrows *v.* Turner, 24 Wend. 276; Hutton *v.* Am. Ins. Co. 7 Hill, 321.

she is safely moored in port. And if before or within the twenty-four hours a dangerous storm begins, she is insured until that storm, or its danger, ceases.[1]

Goods, we have seen, are covered in their transit from the ship to the shore.[2]

SECTION XXIV.

OF TOTAL LOSS AND ABANDONMENT.

The law of insurance recognizes an actual total loss, and a constructive total loss. It is actual when the whole property passes away, as by submersion or destruction by fire.[3] It is a constructive total loss, when the ship or goods are partially destroyed, and the law permits the insured to abandon the salvage or whatever is saved to the insurers, and claim from them a total loss. In other words, a constructive total loss is a partial loss made

[1] Meigs *v.* The Mut. Mar. Ins. Co. 2 Cush. 439. In this case, the insurance was on a vessel and her catchings, on a whaling voyage, the risk to continue on and during her voyage and back to M. "until she be arrived and moored twenty-four hours in safety, and on the property until landed." On the return of the vessel to M. the water was not high enough to enable her to reach her wharf which was her place of final destination. She was accordingly anchored in the harbor, and while being lightened and on her way to the wharf with proper diligence, she was destroyed by fire. This did not happen until more than a week after her arrival in the harbor. The court held that under these circumstances, the insurers were liable. They say: "Reaching the harbor, therefore, cannot be arriving within the meaning of the policy; and if it do not mean that, it must mean that particular place or point in the harbor, which is the ultimate destination of the ship. Until that point is reached, the voyage is not ended, and the ship has not arrived; though she may be obstructed and delayed in her progress through the harbor, and for want of water, or by adverse winds or other causes, be obliged to come to anchor, and remain at anchor twenty-four hours, and to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination, and of complete and final unlading, and until she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy." See also, Angerstein *v.* Bell, Park on Ins. 54; Zacharie *v.* Orleans Ins. Co. 5 Martin, N. S. 637; Dickey *v.* Unit. Ins. Co. 11 Johns. 358; Samuel *v.* Roy. Exch. Ass. Co. 8 B. & C. 119; Bill *v.* Mason, 6 Mass. 313; King *v.* Middletown Ins. Co. 1 Conn. 184. In Waples *v.* Eames, 2 Str. 1243, it was held that where a ship was ordered into quarantine within twenty-four hours after her arrival, the risk continued till she had been moored in safety twenty-four hours after the expiration of the quarantine.

[2] See *ante*, p. 459, n. 3.

[3] Cambridge *v.* Anderton, 2 B. & C. 691; Walker *v.* Protection Ins. Co. 29 Maine, 317. In Bullard *v.* The Roger Williams Ins. Co. 1 Curtis, 152, Mr. Justice *Curtis*, says: "An abandonment is necessary only in case of a constructive total loss; if the loss be actually total, the insured may recover for it without an abandonment." He then goes on to say that if the vessel be incapable of repair, she has ceased to exist as a vessel, and no abandonment is necessary. And the same rule applies when the cost of repairs would exceed the value of the vessel when repaired. See, also, Smith *v.* Manf. Ins. Co. 7 Met. 448; Murray *v.* Hatch, 6 Mass. 465; Roux *v.* Salvador, 3 Bing. N. C. 266; Irving *v.* Manning, 1 H. L. Cas. 287, 304.

total by an exercise of the right of abandonment.[1] A constructive total loss is sometimes called a "technical" total loss.

The abandonment transfers all that remains of the property to the insurers. If nothing remains, or if that which remains have no value, there need be no abandonment, and this is an actual total loss.

The insured never need make an abandonment if he chooses not to do so. And if from such choice or neglect he makes no abandonment, his claim against the insurers is still perfect;[2] but is now to be settled as a partial loss, of which we shall speak presently. For it is the purpose and effect of an abandonment to convert an actual partial loss into a constructive total loss. And if he makes an abandonment when he has no right to make it, such abandonment is wholly inoperative, unless the insurers choose to accept it, in which case they must settle the loss as a total loss.

The topics in relation to this subject, which we will consider, are: 1. The necessity of abandonment. 2. The right of

[1] Gracie *v.* N. Y. Ins. Co. 8 Johns. 237, 244; Martin *v.* Crokatt, 14 East, 465; Bell *v.* Nixon, Holt, N. P. 423; Smith *v.* Manf. Ins. Co. 7 Met. 448. In Fleming *v.* Smith, 1 H. L. Cas. 513, 534, Lord *Campbell* says: "A constructive total loss is a good ground for abandonment, but in deciding on the circumstances which constitute a constructive total loss, which is as good a term as a contingent total loss, the reasons which govern the conduct of prudent uninsured owners must be considered. If a prudent person uninsured would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss. Then the question arises what the assured is bound to do under such circumstances, in order to entitle himself to claim as for a total loss. The ship was not submerged or destroyed; it remained in the form of a ship, capable of being repaired, and it was for the captain to determine whether it should be repaired or not. Under these circumstances, the question arises, whether, when the owners of a ship so insured, receive the intelligence that the ship is capable of being repaired, and that it is lying in port, they can claim as for a total loss, without giving notice of abandonment. My opinion is that they cannot do so. According to all the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss by a notice of abandonment, for though, in the judgment of the assured, it may be better not to repair the vessel, the underwriters may, with different means, give directions to repair, and may direct, and are entitled to direct, how the wreck is to be disposed of. It would be an extreme hardship for them to be called on to pay as for a total loss without having the opportunity of making the most of the ship in its disabled state. The law, therefore, requires that notice shall be given in order to convert a constructive into an absolute total loss." See also, Moss *v.* Smith, 9 C. B. 94.

[2] In Smith *v.* Manuf. Ins. Co. 7 Metc. 451, *Shaw*, C. J., says: "It is always optional with the assured, whether or not they will abandon in case of a constructive total loss. If they do not, the ship, and all profits and benefits of salvage, remain to the owners, in the same manner as if the damage were not one half, and did not amount to a constructive total loss; and the assured will be entitled to recover, for a partial loss, an indemnity to the amount of the actual damage suffered, which may exceed fifty per cent., and amount to any sum short of a total loss." Gracie *v.* N. Y. Ins. Co. 8 Johns. 244. Hamilton *v.* Mendes, 2 Burrow, 1211.

abandonment. 3. The exercise of this right. 4. The acceptance of the abandonment. 5. The effect of the abandonment, or of the absence of abandonment.

1. *Of the Necessity of Abandonment.*

It is said that if a ship be completely wrecked, and reduced to "a mere congeries of planks and iron,"[1] or if she has not been heard from for a sufficiently long time, there need be no abandonment, and the insured may claim as for a total loss, without one.[2] In either case, or any other case, if the insurers pay a total loss, they are entitled to whatever shall come to hand of the property insured.[3] And it is usual, and we think more proper to abandon in both of these cases.

If the property was injured by sea peril, and passed from the insured by a justifiable sale by the master, there need, perhaps, be no abandonment, but the insured will account for the proceeds.[4] If, however, he abandon, the salvage or proceeds belong

[1] Per *Abbott*, C. J., in Cambridge *v.* Anderton, 2 B. & C. 691.

[2] Brown *v.* Neilson, 1 Caines, 525; Green *v.* Brown, 2 Str. 1199; Camberling *v.* M'Call, 2 Dall. 280; Gordon *v.* Bowne, 2 Johns. 150. In this case, *Kent*, C. J., says: "There is no precise time from which this presumption is to arise. Each case must depend upon its own circumstances."

[3] See *post*, p. 464, n. 1.

[4] On this point the authorities are very conflicting. The doctrine as laid down in the text has been supported in England in a late case. Roux *v.* Salvador, 3 Bing. N. C. 266, and in several cases in this country. Fuller *v.* Kennebec M. Ins. Co. 31 Maine, 325; The Mut. Safety Ins. Co. *v.* Cohen, 3 Gill, 459; and in Massachusetts, in Gordon *v.* Mass. F. & M. Ins. Co. 2 Pick. 261, 265. The question arose in The Patapsco Ins. Co. *v.* Southgate, 5 Peters, 623; but the court did not deem it necessary to decide it. They however say: "It may not be amiss to observe that there is very respectable authority, and that, too, founded upon pretty substantial reasons, for saying that no abandonment is necessary where the property has been legally transferred by a necessary and justifiable sale. 2 Pick. 261–265." In Hodgson *v.* Blackiston, Park on Ins. 400, n., it was held that in such a case there must be an abandonment. So, also, in Smith *v.* Manufacturers' Ins. Co. 7 Metc. 448, 453. The case of Roux *v.* Salvador, was twice decided; first in the Common Pleas, (1 Bing. N. C. 526; which decision was reversed in the Exchequer, 3 Bing. N. C. 266.) In Smith *v.* Mar. Ins. Co. 7 Metc. 452, 453. *Shaw*, C. J., speaking of this case as first decided, says: "But the subject has undergone an elaborate discussion in a recent case, Roux *v.* Salvador, in which, after a full review of all the cases, it was held that even where the property insured had been sold, and the news of the sale arrived as soon as that of the loss, and where there was a total loss, but not an actual total loss by the destruction of the thing itself, there could not be a recovery for a total loss without abandonment, and this is well supported in principle as well as by authorities." In the Am. Ins. Co. *v.* Francia, 9 Barr. 390, the jury found that the cost of repairs would so far exceed the value of the vessel when repaired, that no prudent man could doubt as to the propriety of selling the vessel, and that the sale was made under circumstances which rendered it legal. The court held that, notwithstanding this, the insured could not recover for a total loss without an abandonment. They also refer to Roux *v.* Salvador, and express their preference for the doctrine laid down in the first decision of that case.

at once to the insurers, and are afterwards at their risk; otherwise they are at his risk.[1]

2. *Of the Right of Abandonment.*

The insured cannot convert every partial loss, however small, into a total loss, by abandonment, transferring the damaged property to the insurers. But by a rule which is nearly universal in this country and not unknown abroad, if the damage by a peril insured against, exceed one half of the value of the property insured, — whether ship, goods, or freight, — he may abandon the property to the insurers and claim as for a total loss.[2] But if the vessel actually reaches her destined port, it seems that she cannot be abandoned, although the repairs would cost more than half of her value.[3]

When we speak of partial loss, it will be seen that by the established usage of this country, an allowance of "one third, new for old," is always made. This means, that if a new thing were given for an old one, because the old one had been injured, the insurer would be more than indemnified. The sails, for example, might be so new that they had lost little of their value; or so old, that they were of no value. To avoid inquiring into each case, usage has adopted as a fair average to apply to all cases, that the thing injured has lost one third of its value. When it is replaced by repairs, the insured therefore pays one third of the cost of repair, and the insurers pay two thirds.

Now, our policies provide that there shall be no total loss by abandonment, unless the injury exceed fifty per cent., when

[1] The effect of an abandonment, as we have seen, *ante*, page 413, note 5, is to transfer to the insurers all the right, title, and interest of the insured. But if he do not abandon he can recover merely for his actual loss.

[2] Per *Parsons*, C. J., Wood *v.* Lincoln and Kennebec Ins. Co. 6 Mass. 479, 482; Deblois *v.* Ocean Ins. Co. 16 Pick. 303; Gardiner *v.* Smith, 1 Johns. Cas. 141; Marcardier *v.* Ches. Ins. Co. 8 Cranch, 39; Clarkson *v.* Phœn. Ins. Co. 9 Johns. 1; Queen *v.* Un. Ins. Co. 2 Wash. C. C. 331; Dickey *v.* N. Y. Ins. Co. 4 Cowen, 222; Dickey *v.* Am. Ins. Co. 3 Wend. 658; Saurez *v.* Sun Mut. Ins. Co. 2 Sandf. 482; Allen *v.* Commercial Ins. Co. 1 Gray, 154.

[3] If a ship arrive at her destined port as a ship, it is very clear that, having performed the voyage which the underwriters warranted she would perform, they are not liable. Parage *v.* Dale, 3 Johns. Cas. 156; Pezant *v.* Nat. Ins. Co. 15 Wend. 453. But if she arrive a mere wreck, so as not to be worth repairing, then she does not arrive as a ship, and consequently the underwriters will be held liable. See, also, the remarks of Lord Chancellor *Cranworth* in The Scottish Mar. Ins. Co. *v.* Turner, 20 Eng. L. & Eq. 37.

"estimated as for a partial loss;" that is, one third off. Consequently, the repairs necessary to restore the vessel to a sound condition must amount to more than seventy-five per cent. of her value when repaired, (one third of which, twenty-five per cent., being cast off, leaves fifty per cent.,) before there can be an abandonment, which the insurers are bound to accept, and settle the loss as a total loss. We think, however, the usage not sufficient to require that this one third shall be cast off, unless expressly stipulated as above stated, or in some equivalent manner.[1]

The valuation in the policy, if there be one, generally determines the value on which this estimate is to be made. But in some of our States it does not, and there that value must be shown by evidence.[2] The premium, we think, should be excluded; but this may not be quite settled.[3] A loss by jettison,[4] by salvage, by general average contribution,[5] by wages of sailors paid while they assisted in making the repairs, should be included in the fifty per cent.[6] If the insured have lost a part of his goods by jettison, and have a claim for contribution which is not yet paid, the whole of his loss is to be included to make up the fifty per cent., and the insurers take the claim to contribution by

[1] In Massachusetts the rule is well settled that in every case one third off new for old should be deducted. Sewall *v.* U. S. Ins. Co. 11 Pick. 90; Winn *v.* Col. Ins. Co. 12 Pick. 279; Deblois *v.* Ocean Ins. Co. 16 Pick. 303; Allen *v.* Commercial Ins. Co. 1 Gray, 158. So in New York, Smith *v.* Bell, 2 Caines Cas. 153; Pezant *v.* Nat. Ins. Co. 15 Wend. 453. On the other hand it is opposed by Chancellor Kent, (Comm. vol. iii. p. 330,) also in Pennsylvania, Am. Ins. Co. *v.* Francia, 9 Barr. 390. By the Supreme Court of the United States, Bradlie *v.* Maryl. Ins. Co. 12 Peters, 378. By Mr. Justice *Story*, in Peele *v.* Merch. Ins. Co. 3 Mason, 27; and in Robinson *v.* Commonwealth Ins. Co. 3 Sumn. 220.

[2] In Peele *v.* Merch. Ins. Co. 3 Mason, 27, Mr. Justice *Story* adopted the value for sale at the time of the loss. The rule is so laid down in Bradlie *v.* Maryland Ins. Co. 12 Peters, 378. See, also, Fontaine *v.* Phœnix Ins. Co. 11 Johns. 293; Depeyster *v.* Col. Ins. Co. 2 Caines, 85; Am. Ins. Co. *v.* Center, 4 Wend. 45; S. C. 7 Cowen, 564. In Massachusetts the rule is well settled the other way. Deblois *v.* Ocean Ins. Co. 16 Pick. 303; Hall *v.* Ocean Ins. Co. 21 Pick. 472; Allen *v.* Commercial Ins. Co. 1 Gray, 154. In New York, the rule seems to be as in Massachusetts. See Dickey *v.* N. Y. Ins. Co. 4 Cowen, 222; Am. Ins. Co. *v.* Ogden, 20 Wend. 287.

[3] See Ogden *v.* Col. Ins. Co. 10 Johns. 273; Mayo *v.* Maine F. & M. Ins. Co. 12 Mass. 259; Brooks *v.* Oriental Ins. Co. 7 Pick. 259; Orrok *v.* Commonwealth Ins. Co. 21 Pick. 456. Mr. Phillips lays down the most reasonable rule, that if the premium is included in determining the value of the subject, it should also be in estimating the amount of repairs. 2 Phillips on Ins. § 1552.

[4] See Pezant *v.* Nat. Ins. Co. 15 Wend. 453; Reynolds *v.* Ocean Ins. Co. 22 Pick. 191; Col. Ins. Co. *v.* Ashby, 13 Peters, 343.

[5] Moses *v.* Col. Ins. Co. 6 Johns. 219; Sewall *v.* U. S. Ins. Co. 11 Pick. 90; Bradlie *v.* Maryl. Ins. Co. 12 Peters, 378. See, also, Orrok *v.* Commonwealth Ins. Co. 21 Pick. 456.

[6] Hall *v.* Ocean Ins. Co. 21 Pick. 472.

abandonment.[1] The expense of repairs is to be taken at the place where actually made, or where they must have been made, if made at all.[2]

If the repairs cost less than fifty per cent., and the ship is bottomed for the amount, and afterwards sold on the bottomry bond, this is a total loss; unless the vessel came within reach of the owner, so as to make it his fault or neglect that she was sold.[3]

If a sale be lawfully made by the master, under the authority from necessity which we have considered in the chapter on the Law of Shipping, this is a total loss, and the insured must account for the proceeds.[4]

If distinct interests are included in one policy, either under one valuation, or under no valuation, they are so far united as one subject-matter of the insurance, that the general rule requires that they should all be abandoned together, and therefore an abandonment of one alone is ineffectual.[5] But it seems to be

[1] It was held, in Lapsley *v.* Pleasants, 4 Binney, 502, that a demand must be first made on those benefited by the jettison, before the insured could recover of the underwriters. In a late case in Massachusetts, Forbes *v.* Manufacturers Ins. Co. 1 Gray, 371, the true rule is laid down that the underwriters may be held in the first place. See, also, Maggrath *v.* Church, 1 Caines, 196; Judah *v.* Randal, 2 Caines, Cas. 324; Amory *v.* Jones, 6 Mass. 318; Potter *v.* Providence Washington Ins. Co. 4 Mason, 301.

[2] Center *v.* Am. Ins. Co. 7 Cowen, 564; S. C. 4 Wend, 45; Sewall *v.* U. S. Ins. Co. 11 Pick. 90; Saurez *v.* Sun Mut. Ins. Co. 2 Sandf. 482. So, if a vessel is at a port where complete repairs cannot be made, but partial may be, which will enable her to go to a port where she can be put in complete repair, it is the duty of the captain to take her to such a port, if the expenses of both would be less than half her value. Orrok *v.* Com. Ins. Co. 20 Pick. 456; Sewall *v.* U. S. Ins. Co. 11 Pick. 90. So if she were at a port where no repairs could be had, but she could go in safety to another, where such could be had. Hall *v.* Franklin Ins. Co. 9 Pick. 483.

[3] Am. Ins. Co. *v.* Ogden, 15 Wend. 532; S. C. 20 id. 287; Bradlie *v.* Maryland Ins. Co. 12 Peters, 378. In Allen *v.* Commercial Ins. Co. 1 Gray, 154, the vessel arrived at her port of destination in such a condition that her estimated repairs were $5,248. This, after deducting one third, new for old, was less than half her value. The owners were present, but having no funds, the vessel was sold. *Thomas, J.*, in delivering the opinion of the court, says: "If this vessel had been in a port of necessity, in the condition described in the report, and the master had found it impossible to obtain the requisite funds for her repair, by bottomry or otherwise, or to consult the owners, a sale might have been justified; and upon abandonment, no lien or incumbrance having been created to deprive the underwriter of the rights which it is the object of an abandonment to secure, a total loss might have been claimed, though the cost of repair would have been less than fifty per cent." The claim was denied in this case. See, also, Depau *v.* Ocean Ins. Co. 5 Cowen, 63.

[4] See *ante*, p. 463, n. 4.

[5] In Stocker *v.* Harris, 3 Mass. 413, the point was taken by counsel that an owner could not abandon his interest in a ship only, where ship, cargo, and freight were jointly insured. It was not, however, decided by the court. In Hurtin *v.* Phœn. Ins. Co. 1 Wash. 400, it seems to have been taken for granted that, where the insurance was on the vessel and cargo, the latter could be abandoned separately. In Guerlain *v.* The Col. Ins. Co. 7 Johns. 527, it was held that where insurance was effected on different kinds of goods by one policy, there could not be a total loss of any one article of the

also held, that if these interests, or if several portions of the cargo are separately valued, this makes them so far distinct from each other, that there may be a separate abandonment of one or the other.[1]

3. *Of the Exercise of the Right of Abandonment.*

As an abandonment has the effect of an absolute transfer of the property to the insurers, and is intended for this purpose, it is obvious that it cannot be made by one who is not possessed of such title to the property, or such interest therein as would enable him to make a valid transfer.[2]

There is no especial form or method of abandonment. But the proper and safe way is to do it in writing,[3] and to use the word "abandon," or "abandonment,"[4] although other words of entirely equivalent meaning might suffice.[5] It must be distinct and unequivocal, and state, at least in a general way, the grounds of the abandonment.[6]

cargo, without there was a total loss of the whole. See, also, Marshall on Ins. 2d ed. p. 600.

[1] It was so held in New York, in Deidericks *v.* Com. Ins. Co. 10 Johns. 234, per *Kent*, C. J. This case was decided on the authority of Marshall on Ins. 2d ed. p. 600.

[2] Every abandonment, says Valin, must be pure and simple, and not conditional, otherwise it would not act as a transfer of ownership, which is of the very essence of abandonment. Valin, tit. vi.; Des Assurances, art. 60, vol. ii. p. 418. The rule seems to be that the insured cannot abandon unless he can put the insurer in the same position in which he stood, in relation to the subject-matter, at the time the contract was entered into. See Higginson *v.* Dall, 13 Mass. 96; Rice *v.* Homer, 12 Mass. 230; Gordon *v.* Mass. F. & M. Ins. Co. 2 Pick. 249; Depau *v.* Ocean Ins. Co. 5 Cowen, 63. In Allen *v.* Commercial Ins. Co. 1 Gray, 154, the Court say: "The brig was bottomried for necessary recruits, that lien was not discharged before the abandonment, and it may well be doubted, though it is not necessary to determine this point, those before stated being conclusive, whether the plaintiffs could make a valid abandonment before discharging the lien so created."

[3] Unless the policy contains some stipulation to the contrary, it has been held that a valid abandonment may be made by parol. Read *v.* Bonham, 3 Brod. & Bing. 147. See also, Duncan *v.* Koch, J. B. Wallace, 33. In Parmeter *v.* Todhunter, 1 Camp. 541, Lord *Ellenborough* said: "It would be well to prevent parol abandonments entirely; but if they are allowed, I must insist upon their being express."

[4] Per Lord *Ellenborough*, Parmeter *v.* Todhunter, 1 Camp. 541.

[5] Thus it has been held that a demand for a total loss is an abandonment. Patapsco Ins. Co. *v.* Southgate, 5 Peters, 604; Cassedy *v.* Louisiana State Ins. Co. 18 Martin, (6 N. S.) 421. See, also, Watson *v.* Ins. Co. of N. A. 1 Binn. 47; Calbreath *v.* Gracy, 1 Wash. 219. But in Parmeter *v.* Todhunter, above cited, Lord *Ellenborough* was of a different opinion.

[6] In Hazard *v.* N. Eng. Mar. Ins. Co. 1 Sumner, 218, Mr. Justice *Story* said he had always supposed that a letter of abandonment, must state the cause of the loss, but for the purposes of the trial he ruled that the one in question was sufficient. In Bullard *v.* The Roger Williams Ins. Co. 1 Curtis, 152, Mr. Justice *Curtis* says: "Now, a letter of abandonment must state the cause of the loss, and the cause stated must be a peril

If the abandonment be deficient in form, the insurers waive any objection of this kind, by calling for further proof and otherwise acting as if the abandonment were altogether sufficient.[1]

The insured may abandon at any time when the ship, by a peril insured, is taken for an uncertain period from the master's control, and the voyage is broken up, and cannot be renewed, unless at a cost which of itself gives this right.[2]

The existence of the right depends upon the actual state of facts at the time, and not upon the supposed facts. If a ship be captured or stranded, and the owner, on receiving notice, make an abandonment, and the ship be restored or got off from the shore before the abandonment is actually made, although the owner be wholly ignorant of it, the abandonment is wholly void.[3] But if the facts existing when the abandonment was made, were such as to justify the abandonment, it will be

within the policy." See, also, Peirce *v.* Ocean Ins. Co. 18 Pick. 83; Macy *v.* Whaling Ins. Co. 9 Met. 359; Suydam *v.* Mar. Ins. Co. 1 Johns. 181; Dickey *v.* N. Y. Ins. Co. 4 Cowen, 222; King *v.* Delaware Ins. Co. 2 Wash. C. C. 300.

[1] In Macy *v.* Whaling Ins. Co. 9 Metc. 354, it was held that where an abandonment was made, and the insured claimed a total loss under the policy, without stating the cause of the loss, but referring to intelligence which he had received, it would not be defective, because the underwriter could demand this intelligence, and time would be allowed him to decide whether to accept or not. In Ocean Ins. Co. *v.* Francis. 2 Wend. 64, the insurers made no objection to the proof of the interest of the plaintiff, but put their refusal to pay upon another ground. *Held* that this was a waiver of further proof. See, also, Calbreath *v.* Gracy, 1 Wash. C. C. 219; McLellan *v.* Maine F. & M. Ins. Co. 12 Mass. 246.

[2] Rhinelander *v.* Ins. Co. of Penn. 4 Cranch, 41; In Peele *v.* The Merchants' Ins. Co. 3 Mason, 65, Mr. Justice *Story* says: "The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority; where there is a present total loss of the physical possession and use of the ship." See, also, Roux *v.* Salvador, 3 Bing. N. C. 266, and cases *passim*.

[3] The English doctrine is best expressed in the words of Lord *Mansfield*, in Hamilton *v.* Mendes, 2 Burrow, 1198, 1210. "The plaintiff's demand is for an indemnity. His action, then, must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification is, in truth, an average, or perhaps no loss at all." The rule, thus laid down, has been followed in M'Corthy *v.* Abel, 5 East, 388; Naylor *v.* Taylor, 9 B. & C. 718; Bainbridge *v.* Neilson, 10 East, 329; Patterson *v.* Ritchie, 4 M. & S. 393; Cologan *v.* Lond. Ass. Co. 5 M. & S. 447; Hudson *v.* Harrison, 3 B. & B. 105. See, however, the opinion of Lord *Eldon* in the House of Lords. Smith *v.* Robertson, 2 Dow, 474. In Peele *v.* Merchants' Ins. Co. 3 Mason, 27, the doctrine, as now established in this country, is thus stated by Mr. Justice *Story*: "An abandonment once rightfully made, is conclusive, and the rights following from it are not divested by any subsequent events which may change the situation of the property." But we should say that the question whether "rightfully made," must depend upon the facts actually existing when it was made. See, also, Rhinelander *v.* The Ins. Co. of Penn. 4 Cranch, 29; Ches. Ins. Co. *v.* Stark, 6 Cranch, 268; Lee *v.* Boardman, 3 Mass. 238; Jumel *v.* Mar. Ins. Co. 7 Johns. 412; Bordes *v.* Hallet, 1 Caines, 444; Cincinnati Ins. Co. *v.* Bakewell, 4 B. Monroe, 541.

good, although subsequent occurrences show that the vessel was neither lost nor endangered as was supposed.[1] Nothing, however, gives the right of instant abandonment, without a faithful endeavor of the master to find, if he can, and use, if he can, some means of deliverance and safety.[2] But if, when delivered and restored to the master, her damage amounts to more than half of her value, estimated as above stated,[3] she may then be abandoned. If the precise voyage insured be broken up by a peril insured against, this justifies an abandonment, although the vessel might be put in condition to pursue a different voyage or render a different service.[4]

As the insurers, who take the salvage property by abandonment, have a right to every possible opportunity to make the most of it, it follows as an invariable and universal rule, that the insured *must* make an abandonment immediately after he receives the intelligence which justifies it; and if he does not, he will be regarded as having elected not to abandon, and no subsequent abandonment will have any effect.[5] It may be stipulated in the policy that he shall have so many days after receiv-

[1] Church *v.* Bedient, 1 Caines Cas. 21; Penny *v.* New York Ins. Co. 3 Caines, 155; Schieffelin *v.* New York Ins. Co. 9 Johns. 26. See, also, cases cited in preceding note. In Peele *v.* Merchants' Ins. Co. 3 Mason, 27, Mr. Justice *Story* says: "We are not to judge by subsequent events, except so far as they operate by way of evidence upon the preëxisting state of the ship. The right of abandonment depended altogether upon the facts as they were, and the conclusions which reasonable men ought then to have drawn from them in the exercise of sound discretion."

[2] Fontaine *v.* Phœn. Ins. Co. 11 Johns. 293; Wood *v.* Lincoln & Kennebec Ins. Co. 6 Mass. 483; Idle *v.* Roy. Exch. Assurance Co. 8 Taunt. 755.

[3] See *supra*, p. 465, notes 2 and 3.

[4] "The right to abandon exists whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is for the present gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage, is uncertain or unreasonably distant, or the risk and expense are disproportionate to the expected benefit and objects of the voyage." Per Mr. Justice *Story*, Peele *v.* Merch. Ins. Co. 3 Mason, 65. In Abbott *v.* Broome, 1 Caines, 292, a ship was insured on a voyage from Batavia to New York. The vessel put into St. Kitts in a damaged condition, and was there sold because she could not be repaired sufficiently to enable her to bring in all her cargo. Subsequently she brought in part of it. It was held that the insured might abandon.

[5] Mitchell *v.* Edie, 1 Term, 608; Calbreath *v.* Gracy, 1 Wash. C. C. 219; Hudson *v.* Harrison, 3 B. & B. 105. What is reasonable time must depend upon the circumstances of each particular case, and is to be determined by the jury. Ches. Ins. Co. *v.* Stark, 6 Cranch, 273; Livingston *v.* Maryland Ins. Co. 7 Cranch, 506; Read *v.* Bonham, 3 B. & B. 147. See, also, Smith *v.* Newburyport M. Ins. Co. 4 Mass. 668; Savage *v.* Pleasants, 5 Binn. 403; Barker *v.* Blakes, 9 East, 283; Mellish *v.* Andrews, 15 East, 13; Bell *v.* Beveridge, 4 Dall. 272; Duncan *v.* Koch, J. B. Wallace, 33. In Hunt *v.* Royal Exch. Ass. Co. 5 M. & S. 47, a delay of five days was held fatal. See, also, Aldridge *v.* Bell, 1 Starkie, 498; Smith *v.* Del. Ins. Co. 3 Wash. C. C. 127; Krumbhaar *v.* Mar. Ins. Co. 1 Serg. & Rawle, 281; Fleming *v.* Smith, 1 House of Lords' Cas. 513; Mar. Ins. Co. *v.* Tucker, 3 Cranch, 357; Hurtin *v.* The Phœnix Ins. Co. 1 Wash. C. C. 400.

ing intelligence, for abandonment. But while this gives him a right to delay, it does not oblige him to, and he may therefore make a valid abandonment at once.[1]

The abandonment may be made on information of any kind, if it be entitled to weight and credence. So even a general rumor without specific intelligence to the insured, will authorize an abandonment, if the rumor seems to be well grounded and altogether credible.[2]

We regard it as an ancient, reasonable, and well-established rule, that, if insurers pay as for a total loss, this payment entitles them to full possession of all that remains of the property insured, and also of all rights, claims, or interests, which the insured has in, or to, or in respect of the property lost, which, if he valued or enforced them himself, would, if added to the amount paid by the insurers, give him a double indemnity. Hence, if the insured has lost his goods by jettison, and has a claim for a general average contribution, and the insured pay him for all his goods, they stand in his place, and acquire that claim for contribution which the loss of the goods gave him. And we should, very generally at least, extend this rule to the claim which a mortgagee has on the mortgage, for his debt. That is, if the insurers pay for the loss of the property which secures the debt, they acquire, to the extent of their payment, the mortgagee's claim against the debtor. But in a recent case, some nice distinctions are taken on this subject.[3]

If the salvage which the insurers take, is encumbered with liens or charges, the insured must pay or satisfy these,[4] excepting

[1] In Livingston *v.* Maryl. Ins. Co. 6 Cranch, 274; S. C. 7 Cranch, 506, the underwriters agreed that if the vessel should be captured, the assured might take such measures as they should judge best for the interest of the parties without prejudice to their rights; the court considered this to be an agreement on the part of the insurers that the right of abandonment should remain in suspense while the property was detained, but that the insured might abandon at any time during the detention. See, also, Col. Ins. Co. *v.* Catlett, 12 Wheat. 383; Lovering *v.* Mercantile Ins. Co. 12 Pick. 345.

[2] Bosley *v.* Ches. Ins. Co. 3 Gill & Johns. 450; Muir *v.* Unit. Ins. Co. 1 Caines, 54. But it is not enough that it was properly made upon supposed facts, if it turn out that no such facts existed. The right of abandonment depends, as we have seen, on the state of facts at the time of the abandonment. Bainbridge *v.* Neilson, 10 East, 329, 341; Duncan *v.* Koch, J. B. Wallace, 33.

[3] See cases cited *ante*, p. 413, n. 5.

[4] Williams *v.* Smith, 2 Caines, 13. In this case, Mr. Justice *Thompson* says: "In ordinary cases, immediately upon abandonment, the subject would become the property of the underwriter. If, then, the underwriter has been deprived of this property, in consequence of an incumbrance for which he is not answerable, the assured must put him in the same situation he would have been in, had no such lien existed."

so far as they spring from, or may be referred to, a peril which the insurers have insured against. As, for example, they take a ship free from liens for wages earned before the peril, but must themselves pay any wages earned in saving the ship.[1] And, indeed, the insurers may be bound for wages and expenses incurred in good faith and with a reasonable discretion in the endeavor to save the ship, — which, by the peril and abandonment, was their property, — although the amount of the charges was greater than the value of the salvage.[2] But not for expenses after the insurers had refused to accept the abandonment, and expressly directed that no more charges should be made on their account. If, however, this prohibition were not in good faith, and tended to the destruction of the property, it would be ineffectual.[3]

By the abandonment, both the owner and the master become, to some extent, the trustee and agents of the insurers, in respect to the property abandoned; and are bound to act, in relation to it, with care and honesty.[4] Still, if the property, after abandonment, or after a loss for which there is to be an abandonment, be further lost or wasted, by the bad faith or neglect of the master, or of the consignee of the owner, while acting as such, this loss must be made up by the owner, because, although they are, in a certain sense, agents of the insured, they remain agents of the owner, and he is responsible for them to the insured.[5]

Goods are totally lost if destroyed, or if so injured as to have little or no value for the purpose for which they are intended; or if the voyage upon which the insurance on the goods was effected, is entirely broken up.[6] And, in addition to all this, the fifty per

[1] Frothingham *v.* Prince, 3 Mass. 563. See also Hartford *v.* Jones, 1 Ld. Raym. 393; 2 Salk. 654. In Coolidge *v.* Gloucester Mar. Ins. Co. 15 Mass. 341, *Parker*, C. J., says: "But after the loss, the insurers, in virtue of the abandonment, become the owners, and are liable for the repairs and expenses, and are entitled to the earnings of the ship."

[2] See *post*, Adjustment, p. 487, n. 1.

[3] 2 Phillips on Insurance, § 1726.

[4] Curcier *v.* Phil. Ins. Co. 5 S. & R. 113; Lee *v.* Boardman, 3 Mass. 238; Gardiner *v.* Smith, 1 Johns. Cas. 141.

[5] Dederer *v.* Del. Ins. Co. 2 Wash. C. C. 61; Columbian Ins. Co. *v.* Ashby, 4 Pet. 139; United Ins. Co. *v.* Scott, 1 Johns. 106, 110. It is well settled that, if the master sell the ship, when there is no necessity for a sale, the underwriters are not responsible, though, in so doing, he acted with the utmost good faith. Bryant *v.* Commonwealth Ins. Co. 6 Pick. 131; S. C. 13 Pick. 543. See also the remarks of Mr. Justice Bayley, in Gardner *v.* Salvador, 1 Mood. & Rob. 116.

[6] We have considered, *ante*, p. 421, n. 5, in what cases a voyage will be considered as broken up in regard to memorandum articles, and the same rule will apply to cases of insurance upon other articles, with this difference, that, in the one case the insured

cent. rule, of which we have already spoken, is applicable to goods, in this country;[1] subject, however, to the important qualifications, that it does not apply if any substantial portion of the goods arrives at their destination uninjured;[2] or if the goods are insured "free from average."[3] And the rule of abandonment, salvage, and transfer to the insurers, is the same in relation to goods as to the ship.

The ship may be totally lost, and not the goods. And we have seen, in our chapter on Shipping, that, if the ship be wrecked, and the goods are or can be saved, it is the duty of the master to send them forward to their destined port, if this is within his power, and the circumstances of the case do not make it useless or clearly unwise. If he cannot transmit them, he is bound to do that which is, on the whole, the best thing for the interest of all concerned.[4] If he fails to do his duty, and the goods are lost, wholly or partially, by this failure, the insurers are not responsible, unless they have insured the owner of the goods against the misconduct of the master.[5] And the shipper of the goods has his remedy against the owner of the ship for loss incurred by the master's misconduct,[6] which claim passes over to the insurers of the goods, if they pay the loss to the shipper.[7]

So, if there be many several shipments all insured, there may

are bound to do every thing in their power to send on the goods, so that they will arrive in specie, while in the other they must be of value on arrival. See Manning *v.* Newnham, 3 Doug. 130; Ludlow *v.* Col. Ins. Co. 1 Johns. 335; Lawrence *v.* New Bedford Com. Ins. Co. 2 Story, 471; Hunt *v.* Roy. Exch. Ass. Co. 5 M. & S. 47; Hudson *v.* Harrison, 3 Brod. & Bing. 105; Moss *v.* Smith, 9 Common Bench, 94; Wilson *v.* Roy. Exch. Ass. Co. 2 Camp. 626; Bryant *v.* Commonwealth Ins. Co. 6 Pick. 131.

[1] Marcardier *v.* Ches. Ins. Co. 8 Cranch, 39; Gardiner *v.* Smith, 1 Johns. Cas. 141; Judah *v.* Randal, 2 Caines Cas. 324; Moses *v.* Col. Ins. Co. 6 Johns. 219; Gilfert *v.* Hallet, 2 Johns. Cas. 296.

[2] In Forbes *v.* Manufacturers' Ins. Co. 1 Gray, 371, the goods on arrival were damaged to an amount equal to 62 per cent. of their value. The court held that there was no total loss. See also Roux *v.* Salvador, 3 Bing. N. C. 266; Seton *v.* Del. Ins. Co. 2 Wash. C. C. 175.

[3] See *ante*, p. 421, n. 5.

[4] See *ante*, chapter on the Law of Shipping, p. 380, and n. 1.

[5] See *ante*, p. 471, n. 5.

[6] The liability of an owner of a vessel for the acts of a master, done within the scope of his authority, is a well-settled principle of our jurisprudence. In Ellis *v.* Turner, 8 Term, 531, a loss of a part of a cargo occurred in consequence of the misconduct of the master of the vessel, and an action having been brought against the owners of the vessel, Lord *Kenyon* said: "Though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action." See also Stone *v.* Ketland, 1 Wash. C. C. 142; Purviance *v.* Angus, 1 Dall. 180; Schieffelin *v.* Harvey, 6 Johns. 170; Watkinson *v.* Laughton, 8 Johns. 213.

[7] See *ante*, p. 413, n. 5.

be a total loss of one, a partial loss of another, and none of a third.[1]

The rule which gives a power of sale to the master, in a case of urgent necessity, and only then, applies to the goods as well as to the ship.[2] And if goods are hypothecated, the rule is the same as where the ship is bottomed.[3]

The freight is totally lost when the ship is totally lost, or made unnavigable, or is subjected to a detention of such a character as to break up the voyage. If there be a constructive total loss of the ship, the owner may abandon the freight with the ship.[4] But if the ship be actually lost, the freight may not be; for the master has the right, and is under the duty, as we have seen, of transmitting the goods, if he can. And if he does, the owner of the ship is entitled to the whole of his freight; and the expense of the transmission is all his loss. If the master might have done this, and fails to do it, the estimated expense of transmission is still all the loss for which the insurers are responsible.[5]

So, if the ship can be repaired and go on again, and finish her voyage, the owner would have the right to hold on to the goods, and finally carry them and earn his freight.[6] And he has this right, although the delay would be very long, and even if the

[1] Vandenheuvel *v.* The United Ins. Co. 1 Johns. 406.

[2] Bryant *v.* The Commonwealth Ins. Co. 6 Pick. 131; Searle *v.* Scovell, 4 Johns. Ch. 218; Saltus *v.* Ocean Ins. Co. 12 Johns. 107.

[3] Am. Ins. Co. *v.* Coster, 3 Paige, Ch. 323; The Zephyr, 3 Mason, 341.

[4] Am. Ins. Co. *v.* Center, 4 Wend. 45. In Benson *v.* Chapman, 6 Man. & Grang. 810, *Tindal*, C. J., says: "The assured has sustained a total loss of the freight, if he abandons the ship to the underwriters on the ship, and is justified in so doing; for, after such abandonment, he has no longer the means of earning the freight, or the possibility of receiving it, if earned, such freight going to the underwriters on the ship." Though this case was reversed by the House of Lords, 2 H. L. Cases, 696, yet the Lord Chancellor, in a subsequent case before that tribunal, stated that the reversal proceeded not on the ground that the views of the Chief Justice were erroneous, if the facts had been such as they were supposed to be in the court below, before the facts had been put on the record in the form of a special verdict, namely, that there had been a total loss and abandonment, but because it was considered that the facts found in the special verdict, did not show that there had been a total loss and abandonment. The Scottish Mar. Ins. Co. *v.* Turner, 20 Eng. L. & Eq. 36. See also Coolidge *v.* The Gloucester Mar. Ins. Co. 15 Mass. 341; M'Gaw *v.* Ocean Ins. Co. 23 Pick. 405. In Benson *v.* Chapman, 2 H. L. Cas. 696, above referred to, the ship was injured, and on a survey being called, it was found that her repairs would cost more than the value of the vessel when repaired. The court held that this would have justified an abandonment of the freight, if the ship had been abandoned, but as the master elected to make the repairs, and brought the vessel to her port of destination, there was no loss of freight.

[5] Searle *v.* Scovell, 4 Johns. Ch. 218.

[6] Herbert *v.* Hallett, 3 Johns. Cas. 93; Griswold *v.* New York Ins. Co. 1 Johns. 205; S. C. 3 Johns. 321. And if the ship cannot be repaired, yet it is the duty of the master to send on the goods by another ship, if one can be procured. See Jordan *v.* Warren Ins. Co. 1 Story, 342; Bradhurst *v.* Col. Ins. Co. 9 Johns. 17.

goods are injured, and it would cost time and money to put them in a condition of safety for the residue of the voyage. Still the ship-owner, by his agent, the master, may do all this, and then earn his freight; and, therefore, if it can be done, whether it is done or not, all the claim which the insured on freight can make on the insurers, is for the expense of doing it.[1]

The rule of fifty per cent. applies to freight also. If, therefore, freight *pro rata* be paid, it will be a total loss by construction, if less than half be paid. So, if the ship be injured, and part of the cargo be lost, but the ship may be repaired and carry the remaining goods on, if that part would pay more than half of the whole freight, it has been held not to be total, and otherwise it is.[2]

Freight is fully earned if the goods remain substantially in specie, and are so delivered to the consignee, although there be a very great deterioration. But freight is lost, and the insurers are responsible, if nothing is left of the goods but the mere products of decomposition, so that they are lost in fact.[3]

If, after some freight is earned, there is an abandonment of the ship, and after the abandonment, more freight is earned, the

[1] Clark *v.* Mass. F. & M. Ins. Co. 2 Pick. 104; M'Gaw *v.* The Ocean Ins. Co. 23 Pick. 405. In Lord *v.* The Neptune Ins. Co., Sup. Jud. Ct. Mass., March term, 1854, insurance was effected on the freight of the barque Dana, from New York to Havre. On the third day out, the ship met with a peril and was obliged to put back to New York, where the cargo was discharged, in order to repair the vessel, and sold. It would have taken several months to have prepared the cargo by drying for reshipment, and it was conceded by both parties, that the master acted for the benefit of all concerned in selling it. The court held that, under these circumstances, the insured could not recover.

[2] Such must be the inference from the language of the court, in Am. Ins. Co. *v.* Center, 7 Cow. 564. But there was in that case a constructive total loss of the ship, and in such a case the freight may always be abandoned. See M'Gaw *v.* Eagle Ins. Co. 23 Pick. 405. But the general doctrine stated in the text, seems to us to admit of doubt. It is hardly reconcilable with other authorities, as that of M'Gaw *v.* Eagle Ins. Co., just cited; Jordan *v.* Warren Ins. Co. 1 Story, 342; and Lord *v.* Neptune, cited in the preceding note, and again in the next note.

[3] Ogden *v.* Gen. Mut. Ins. Co. 2 Duer's Rep. 204; Hugg *v.* Augusta Ins. Co. 7 How. 595. In Lord *v.* The Neptune Ins. Co., *Shaw*, C. J., in delivering the opinion of the court, said: "The question, therefore, is not, whether the flour and grain and other articles composing the cargo, would have been of any, or what value at Havre; but whether, on such reshipment and arrival, they would have remained in specie, as flour, wheat, bacon, palm leaf, &c. If so, then, it is clear that they were not so totally lost that the plaintiff was prevented, by the peril insured against, from carrying them and earning his freight." And, again: "But we think that, if the goods are perishable in their nature, and so much damaged, and in such a fermenting and decaying condition, that, though remaining *in specie* at the intermediate port, they will utterly decay and lose their specific character, before they would arrive at the port of destination, it is now the better opinion that they may be deemed totally lost, and sold at the place where they are, and the proceeds will be a salvage for the benefit of the owner of the goods. It is regarded at a total loss, not because of the sale, but because the goods are so far deteriorated and in process of decay, that, before they could reach their place of destination, they would wholly lose their specific character, and cease to be the goods insured."

American cases hold, that the freight earned before the abandonment, goes to the insurers on freight; while that earned after the abandonment, goes to the insurers of the ship. But the French law is the reverse, and, perhaps, the rule in England.[1]

SECTION XXV.

OF REVOCATION OF ABANDONMENT.

An acceptance of an abandonment makes it irrevocable, except with the consent of the insurers.[2] But the insurers may assent; and the assured may, by his acts, revoke his abandonment, and then the insurers, by words, or by their silence, assent. As if the ship be sold as a wreck, and he buys it himself, and treats it as his own; as by selling it as his own, or sending it on another voyage.[3]

It is a different question, whether subsequent events can have the effect of revocation, and make void an abandonment which was justified by facts and rightly made in point of form, at the time. The rule, we should say, was, that no subsequent events could thus annul an abandonment.[4] But if, for example, a vessel

[1] By the French law, an abandonment of the ship gave to the underwriters the benefit of the freight pending at the time of the loss. Boulay Paty, tome 3, p. 481; Valin, tome 2, p. 115; Emerigon, c. 17, § 9. In England, the point does not appear to be fully settled. See Luke *v.* Lyde, 2 Burr. 882; Morrison *v.* Parsons, 2 Taunt. 407; Thompson *v.* Rowcroft, 4 East, 34; M'Corthy *v.* Abel, 5 East, 388; Ker *v.* Osborne, 9 East, 378; Sharp *v.* Gladstone, 7 East, 24; Case *v.* Davidson, 5 M. & S. 79; Davidson *v.* Case, 2 B. & B. 379; Stewart *v.* The Greenock Mar. Ins. Co. 2 H. L. Cas. 159. In this country, it seems now to be well settled that the freight earned prior to the loss, goes to the underwriter on freight, and that earned subsequent, to the underwriter on the ship. Thus, in Coolidge *v.* Gloucester Ins. Co. 15 Mass. 346, Mr. Justice *Putnam* says, speaking of the loss: "Until that event happens, the property remains in the assured; and the freight, or her earnings, belong to him till that time, if he stands his own insurer for the freight; otherwise to the insurer on the freight. But after the loss has happened, the insurers, in virtue of the abandonment, become the owners, and are liable to the repairs and expenses, and entitled to the earnings of the ship." See also Unit. Ins. Co. *v.* Lennox, 1 Johns. Cas. 377; Leavenworth *v.* Delafield, 1 Caines, 574; Simonds *v.* Union Ins. Co. 1 Wash. C. C. R. 443; Kennedy *v.* Balt. Ins. Co. 3 Harris & Johns. 367; Teasdale *v.* Charleston Ins. Co. 2 Brevard, 190.

[2] King *v.* Middletown Ins. Co. 1 Conn. 184.

[3] Abbott *v.* Sebor, 3 Johns. Cas. 39; Ogden *v.* Fire Ins. Co. 10 Johns. 177; S. C. 12 id. 25.

[4] In Hamilton *v.* Mendes, 2 Burr. 1198, Lord Mansfield held that it was repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event showed that the damnification was in truth an average, or, perhaps, no loss at all. This rule is now well settled in England. Bainbridge *v.* Neilson, 10 East, 329; Holdsworth *v.* Wise, 7 B. & C. 794; Cologan *v.* Lond. Ass. Co. 5 M. & S. 447; Naylor *v.* Taylor, 9 B. & C. 718; Hudson *v.* Harrison, 3 B. & B. 105. In this country, the doctrine, as stated in the text, is equally well settled. Peele *v.* Merch. Ins. Co. 3 Mason, 27;

is stranded and in a dangerous position, and the owner, hearing of it, abandons, and the next hour he hears of her safety, by reason of a favorable change of wind or some unexpected deliverance, it may be said that he had not in fact a right of abandonment at the time he made it. The subsequent facts did not take the right away, but only proved that it never existed. This conclusion may seem to conflict with the rule that the right to abandon depends upon the appearance of things at the time; this is, however, their appearance when carefully and wisely considered; and such events would go to show that there had not been a careful and wise consideration of all facts and possibilities. For if it was certainly justified at the time, and then well made, it cannot be in the power of any mere change of circumstances to annul it.

SECTION XXVI.

OF GENERAL AVERAGE.

The general principle upon which the universal rule of general average rests, is reasonable and just, and very simple.

The rule is this. If many interests or properties are in peril, and one or more of them is wholly or partially sacrificed for the purpose of saving the rest, all that is thereby saved must contribute towards indemnifying the owner of that which was sacrificed.

He is not to be indemnified in full; for then he would be better off than those who contribute; he would gain by the fact that, in a common peril, his property was selected to be made the price of the common safety. But there is no reason why he should gain; justice is perfectly satisfied if he is made to suffer no more than the rest do.[1] And this end is attained by the law of general average, because it adds together the whole loss, and considers it the loss of all who were in peril, and by the loss saved from it, and therefore assesses the whole amount of the

Rhinelander *v.* Ins. Co. of Penn. 4 Cranch, 29; Lee *v.* Boardman, 3 Mass. 238; Jumel *v.* Mar. Ins. Co. 7 Johns. 412; Cincinnati Ins. Co. *v.* Bakewell, 4 B. Munroe, 541; Bordes *v.* Hallett, 1 Caines, 444. See also Bainbridge *v.* Neilson, 1 Camp. 237; Smith *v.* Robertson, 2 Dow, 474, per Lord *Eldon*.

[1] Tudor *v.* Macomber, 14 Pick. 34; Strong *v.* Firemen's Ins. Co. 11 Johns. 323; Simonds *v.* White, 2 B. & C. 805; Gray *v.* Waln, 2 Serg. & Rawle, 229, 257.

loss ratably of the loss, upon the whole property that is saved, and in this way, every one interested loses an equal proportion of that which was successfully sacrificed for the common good.

This subject belongs primarily to the law of shipping, and has been considered in the chapter on that subject. But it comes within the scope of the law of insurance when any of the property which is lost or saved, is insured. We must repeat some of our previous remarks here, in connection with the law of insurance.

If an owner of property is insured, and other property is sacrificed to save the insured property from a peril common to it and to the sacrificed property, the insured property must pay such indemnity for the sacrificed property, as will make them suffer alike. And the amount thus paid or contributed by the insured property, is a loss by a sea peril, for which the insurers are liable. On the other hand, the insurers of the sacrificed property have a right to say that their loss is only the amount of what was sacrificed for the common good with the contributed amount deducted therefrom, or else transferred to them.[1]

The essentials of a general average loss, all of which must be present to bring it under this rule, are: —

1. A common peril impending at the time.
2. A voluntary loss or sacrifice of some property, for the purpose of saving other property.
3. The success of this endeavor.[2]

Thus, there must be a common peril, existing at the time;[3] for, if there be no peril, or if it be past, the loss is merely wasteful and uncalled for. And if it be not a common peril, it is not a case of *general* average. We can easily imagine a case in which a thing which could certainly be saved, is voluntarily lost to save that which is in peril; but in such case, the thing perilled and saved should pay the whole value of what is lost to save it; and this is a case of full indemnity, and not of general average. So,

[1] Clark *v.* United Mar. & F. Ins. Co. 7 Mass. 365; 1 Mag. Cas. 19. See also 2 Phillips on Ins. § 1410.

[2] Barnard *v.* Adams, 10 How. 270, 303, per *Grier*, J.; *ante*, p. 373, and n. 1.

[3] It is the duty of the master, or the person in command, to determine when this peril exists. The sea codes generally prescribe that the master shall consult his officers and crew before making a jettison. But, though it is in most cases prudent and right in him to do so, yet there may be times when he must act instantly, and where consultations would be useless. Col. Ins. Co. *v.* Ashby, 4 Pet. 139; Birkley *v.* Presgrave, 1 East, 220; Sims *v.* Gurney, 4 Binney, 513.

if a part only of the property insured is at risk, only that part contributes for the loss which saved it, and, of course, the insurers are bound only so far.[1]

The loss must be voluntary; hence, it is held that, where the property destroyed was not merely in danger, but in the certainty of destruction, there is no voluntary sacrifice which creates a claim for contribution; because, it is not enough for that purpose that one casts away at this moment what he must inevitably lose the next hour or the next day. But when the loss of the whole, or of the specific thing sacrificed, is not inevitable, because it is possible that the loss of a part might save the rest, but something or other must certainly be lost, this is the common case of general average, and that part which is selected for the loss, but which might have been saved had another part been selected, has now its claim for contribution.[2]

And only the property that is saved by means of the sacrifice, contributes. If it is lost, or if it be saved and the sacrifice does not contribute to its safety, there is no reason why it should contribute to indemnify the party making the sacrifice.[3]

Much the most common way in which general average arises, is by *jettison*, or the casting overboard of some part of the cargo or ship, to save the remainder. As, where the cargo is thrown over to lighten a stranded ship, or her masts and rigging are cut away to relieve a laboring ship. If goods jettisoned are recovered, the loss is then only the expense of recovery and restoration, and to this loss the saved interests must contribute.[4]

If goods are put on board a boat or lighter to relieve the ship,

[1] See *post*, Particular Average.

[2] Meech *v.* Robinson, 4 Whart. 360. On page 283 of Benecke on Average, this rule is laid down: "If the master's situation was such, that, but for a voluntary destruction of a part of the vessel, or her furniture, the whole would certainly and unavoidably have been lost, he could not claim restitution, because a thing cannot be said to have been sacrificed which had already ceased to have any value." See also *post*, p. 480, n. 5.

[3] Scudder *v.* Bradford, 14 Pick. 13; Bradhurst *v.* Col. Ins. Co. 9 Johns. 9; Caze *v.* Richards, 2 S. & Rawle, 237, n.; Col. Ins. Co. *v.* Ashby, 13 Pet. 343; The Nathaniel Hooper, 3 Sumn. 542. Valin says, tome 2, p. 207, that the ship ought to be effectually saved, so that she may continue her voyage; for if after the jettison the tempest abate for a short time, and then recommence, and the vessel is wrecked, although it should be some days after the jettison was made, it is not a case of contribution on account of any goods that may be saved from the wreck.

[4] The Ordinance, Art. 22, tit. du jet., says: "If the effects jettisoned are recovered by the owners after contribution, they shall be bound to return to the master and those interested what they have received in the contribution, less the damage still remaining to them from the jettison and the expenses of recovery." See also Pothier, Contracts Maritimes, n. 136, Cushing's ed. 78.

and the boat being in peril, some of its cargo is jettisoned to relieve the boat, the whole ship and cargo contribute.[1] But if they are put on board the boat only for their own benefit and safety, and a part are jettisoned, only the boat and what is saved in it contribute.[2]

While goods carried on deck must contribute if saved by the sacrifice of other property, their own jettison gives no claim for contribution, for they should not be carried there.[3] The only exception to this is where the policy expressly provides otherwise; or a distinct and established usage adds this provision to the express bargain of the parties.[4] So if a boat is cast off in a peril, when it hangs from the stern or side davits, but ought to be on deck, such a loss would not, generally at least, give a claim for contribution.[5]

As the contribution of what is saved towards that which is lost, is always founded upon their respective values, it is important to remember that this value may be greatly diminished before the sacrifice takes place. Thus if a mast be broken off and blown over with all its sails and rigging, and hanging by the side of the ship endangers her, and is cut away and lost to save the ship and cargo, the property saved must contribute not for the full and original value of the mast and rigging, but for its value in the position in which it was when cut away.[6] So if a ship is

[1] Benecke & Stevens, by Phillips, p. 133, *et seq.*; Lewis *v.* Williams, 1 Hall, 430; 1 Mag. 160, Cas. 9.

[2] Whitteridge *v.* Norris, 6 Mass. 125.

[3] Myer *v.* Vander Deyl, Abbott on Ship. 481; Lenox *v.* Unit. Ins. Co. 3 Johns. Cas. 178; Smith *v.* Wright, 1 Caines, 43; Johnston *v.* Crane, Kerr's New Brunswick Rep. 356; Taunton Copper Co. *v.* Mer. Ins. Co. 22 Pick. 108; Ross *v.* Thwaite, Park on Ins. 23.

[4] Cram *v.* Aiken, 13 Maine, 229; Barber *v.* Brace, 3 Conn. 9; Dodge *v.* Bartol, 5 Greenl. 286; Hampton *v.* Brig Thaddeus, 4 Martin, Louis. 584; Gould *v.* Oliver, 4 Bing. N. C. 134; S. C. 2 Scott, N. R. 241. In Harley *v.* Milward, 1 Jones & Carew, Irish Exch. Rep. 224, the owner of pigs carried on deck on a voyage from Waterford to London and jettisoned, recovered against the owners of the vessel for a general average contribution. The ship-owners then sued the underwriters, and, after an elaborate argument, it was held by the Court of Queen's Bench that if the usage justified the carrying of the pigs on deck, the underwriters would be liable. Milward *v.* Hibbert, 3 Ad. & Ellis, N. S. 120.

[5] Lenox *v.* Unit. Ins. Co. 3 Johns. Cas. 178; Benecke & Stevens on Av. (Phillips' ed.) p. 369. See also Hall *v.* Ocean Ins. Co. 21 Pick. 472.

[6] In Benecke & Stevens, (Phil. ed.) p. 111, it is said, that though it is the practice in most countries to allow for the rigging so cut, in general average, at the value which it may be supposed to have had at the time it was so cut, yet in England no such allowance is made. For this, two reasons are given, first, because it was then of no value at all; and, second, because it would be impossible to work the vessel without cutting it away, so that this act would not be optional, but a work of necessity, and consequently, no sacrifice. But if this happened in sight of a port which the vessel might reach with-

dragging her anchors and they are cut away, and cable and anchor lost, their value as they then were, taking into consideration the probability of getting them on board again, must be considered.[1] So if property captured be jettisoned, nothing is contributed towards it unless there be a recapture or restoration which would have extended to the jettisoned cargo.[2]

Insurers on any property must indemnify the insured for their contribution by way of average, for a loss which was itself neither a voluntary sacrifice, nor an expected loss; provided it followed directly and naturally from a voluntary sacrifice.[3] So, if goods are jettisoned and the ship loses the freight of the goods it can no longer carry, the freight must be contributed for.[4]

If a ship be purposely stranded to save ship and cargo, all that is saved must contribute towards the loss; and this may be the whole loss of the ship, or only the expense of getting her off. But if a ship must inevitably be stranded; and all the master can do is to keep her along the shore until he can find the spot which gives the greatest possibility of safety, and casts her there, this is no voluntary stranding and gives no claim for contribution.[5] If a ship be accidentally stranded, the expense of getting her off for the common benefit, is commonly made a subject of general average.[6]

If some part of a cargo is landed in safety, and by a subsequent peril the rest is damaged, there is no contribution. But if

out the rigging being cut, and this were done to give her a better chance of escaping, then it would be a sacrifice. See also Ord. Copenhag. a. 1, § 10; 1 Emerig. c. 12, § 41.

[1] Benecke & Stevens on Average, (Phil. ed.) p. 116; 1 Magens, 345, Case, 28; Weskett, tit. Gen. Av. n. 3.

[2] Price *v.* Noble, 4 Taunt. 123.

[3] Maggrath *v.* Church, 1 Caines, 196.

[4] The Nathaniel Hooper, 3 Sumner, 542; Col. Ins. Co. *v.* Ashby, 13 Peters, 331, 344.

[5] This question has recently been the subject of elaborate investigation by counsel in the case of Barnard *v.* Adams, 10 Howard, 270, where it was held by the court that it was a proper case for contribution in general average, for the loss of a vessel where her going ashore on a rocky and dangerous part of the shore was inevitable, and the master, to avoid this immediate peril, voluntarily stranded her upon a less dangerous part, whereby the crew and cargo were saved. See also The Col. Ins. Co. *v.* Ashby, 13 Peters, 331; Caze *v.* Reilly, 3 Wash. C. C. 298; Sims *v.* Gurney, 4 Binney, 513; Gray *v.* Waln, 2 Serg. & R. 229; Reynolds *v.* Ocean Ins. Co. 22 Pick. 197; Bradhurst *v.* The Col. Ins. Co. 9 Johns. 14; Walker *v.* U. States Ins. Co. 11 S. & R. 61; Meech *v.* Robinson, 4 Whart. 360; Benecke & Stevens on Average, by Phillips, p. 84.

[6] See Firemen's Ins. Co. *v.* Fitzhugh, 4 B. Monroe, 160; Wesk. tit. Gen. Av. n. 2; Benecke & Stevens on Av. (Phillips's ed.) p. 138. In Bedford Com. Ins. Co. *v.* Parker, 2 Pick. 1, 8, *Parker*, C. J., says: "Besides, the general principle, and a very just one, is, that when a vessel shall be accidentally stranded, the expense of getting her off so that she may proceed on her voyage, shall be borne proportionably to its value, by every thing on board as well as by the vessel."

a cargo is landed in successive portions as it always is, and there is a loss or injury to that which comes on shore last, there may be a general contribution.[1]

If a ship is compelled by a sea peril to seek repair, the wages and provisions from the moment she shapes her course for the port of repair, are a subject of contribution in this country; as are all the expenses of temporary repair for the purpose of carrying on the goods; or of any delay which is caused by the endeavor to get repair.[2]

These wages, provisions and expenses, as well as the expenses incurred to obtain recovery from capture or release from detention, or escape from embargo, or hiring convoy where this is necessary, are a subject of general contribution, for which insurers are liable, even if the ship and cargo are not saved. But then, not so much under the law of general average, as because those who incur the expenses are considered as the agents of all interested, who are all, in due proportion, responsible for the acts of their agents.[3]

Money paid to salvors, by decree of salvage or otherwise, in good faith, or to pirates or captors by way of ransom, is to be contributed for; unless something is done in this way which is unlawful.[4]

The insurers are liable for the loss incurred by the insured, in paying his contribution towards funds raised for the common benefit by bottomry of the ship or hypothecation of the goods.[5]

[1] In Bevan *v.* The Bank of the United States, 4 Whart. 301, specie, the property of the defendants, was taken from a vessel which was ice bound, and in imminent danger in Delaware Bay, and carried to Philadelphia. Some weeks after, the vessel arrived at that port with the remaining cargo on board, which had been discharged into lighters and afterwards reshipped. It was held that the defendants were liable to contribute to these charges, although they were incurred after the landing of the specie, as general average.

[2] See Plummer *v.* Wildman, 3 M. & S. 482; Power *v.* Whitmore, 4 M. & S. 141; Padelford *v.* Boardman, 4 Mass. 548; Clark *v.* U. S. F. & M. Ins. Co. 7 Mass. 365; Potter *v.* Ocean Ins. Co. 3 Sum. 27; Brooks *v.* The Oriental Ins. Co. 7 Pick. 259; Walden *v.* Le Roy, 2 Caines, 263; Barker *v.* Phœnix Ins. Co. 8 Johns. 307; Dunham *v.* Com. Ins. Co. 11 Johns. 315; Sage *v.* Middletown Ins. Co. 1 Conn. 239; Ross *v.* Ship Active, 2 Wash. C. C. 226; Jones *v.* Ins. Co. of N. A. 4 Dall. 246; 2 Binn. 547; Giles *v.* Eagle Ins. Co. 2 Met. 140; Thornton *v.* U. S. Ins. Co. 3 Fairf. 153.

[3] Leavenworth *v.* Delafield, 1 Caines, 573; Penny *v.* N. Y. Ins. Co. 3 Caines, 155; Spafford *v.* Dodge, 14 Mass. 66; Dorr *v.* Union Ins. Co. 8 Mass. 494; Kingston *v.* Girard, 4 Dall. 274; Speyer *v.* N. Y. Ins. Co. 3 Johns. 88; Jumel *v.* Mar. Ins. Co. 7 Johns. 412.

[4] Heyliger *v.* The N. Y. Firemen's Ins. Co. 11 Johns. 85; Beawes Lex Mercatoria, tit. Gen. Av. p. 149; Douglas *v.* Moody. 9 Mass. 551; Welles *v.* Gray, 10 Mass. 42; Clarkson *v.* Phœn. Ins. Co. 9 Johns. 1; Vandenheuvel *v.* Unit. Ins. Co. 2 Johns. Cas. 451.

[5] Jumel *v.* The Mar. Ins. Co. 7 Johns. 412; Reade *v.* Com. Ins. Co. 3 Johns. 352; Humphreys *v.* Union Ins. Co. 3 Mason, 429.

The contributory value of the property that is saved, is its value *when* it is saved, or in safety, and as a general rule this is not until its safe arrival in port; and its value then and there is in general its contributory value.[1]

It is often difficult to determine the contributory value of the ship. But the difficulty is one of fact rather than one of law. The general rule must be the same as to the ship, which has just been stated as to the goods; that is, the value which she has at the time of her arrival in the port in which the adjustment is made. But from this value should be deducted all those expenses which were necessary to bring her home in safety, and which arose after the loss that caused the contributory claim; whether they arose from contributions for subsequent jettisons, or for wages and expenses of crew; but these last are not to be deducted if the ship earned her freight, for that is considered as paying these expenses.[2]

If freight be saved and called on to contribute, there must be deducted, if it be earned by transshipping the goods, the expense of transshipment, and the balance is the contributory value. If it be the whole freight, there must be deducted all the charges and expenses after the loss, necessary to earn and get the freight. But as it would often be difficult to adjust this precisely, it is quite usual in this country, to deduct in lieu of these charges, one third of the gross freight, to bring it down to its contributory value. At the same time, if the freight be lost and to be contributed for, the contribution is to gross freight.[3]

In general, all charges and expenses necessary to bring the property saved into a port and a condition of safety, are to be deducted from its value there, in order to reach its contributory value.[4]

Particular average is a phrase not now much employed in this country. It used to be considered synonymous with partial loss.

[1] In Simonds *v.* White, 2 B. & C. 805, *Abbott*, C. J., said, that the laws and usages of all nations agreed in this, that the place at which the average was to be adjusted was the place of the ship's destination or delivery of her cargo. See, also, The Mutual Safety Ins. Co. *v.* Cargo of Ship George, 8 Law Rep. 361.

[2] Douglas *v.* Moody, 9 Mass. 548; Spafford *v.* Dodge, 14 Mass. 66; Leavenworth *v.* Delafield, 1 Caines, 573; Gray *v.* Waln, 2 Serg. & Rawle, 229; Dodge *v.* Un. Ins. Co. 17 Mass. 471.

[3] 2 Phillips on Ins. §§ 1383, 1389; Benecke & Stevens on Av. by Phillips, p. 215; Bedford Com. Co. *v.* Parker, 2 Pick. 1.

[4] See cases cited *supra*.

But this, though very common, was inaccurate. Particular average, strictly speaking, means an average which falls only on some parts of the property when severed from the part; as in the case of a boat-load saved from peril by a sacrifice, to which only the boat and its contents contribute.[1] But as it is adjusted upon these contributory interests by the rules of general average, there is in fact no need of discriminating between general average and particular average.

SECTION XXVII.

OF PARTIAL LOSS.

A partial loss is simply a loss of a part, and not of the whole. The principal questions relating to it arise out of the rule of one-third off, new for old, which has been already spoken of.[2]

The first effect of this rule is, that the thing or the part lost or injured, whether it be new or old, worn out or not worn at all, must be replaced or repaired in adaptation and conformity with the vessel, in the same way in which it would be if she were properly repaired at the owner's port, by his orders.[3]

This third part is generally, and we think rightly, deducted from dockage, moving the ship, and similar expenses, provided they are incidental to the main purpose of repair.[4]

Whether the deduction should be made of the value of the old materials from the expense of repair, may not be settled by authority; but we think this should be the rule. Thus, if a sea-peril makes it necessary to re-copper a vessel, and the cost will be $9,000, and her old copper is worth $3,000, we should say that this should be deducted, leaving $6,000, for two thirds of which only ($4,000) the insurers would be liable. The other way would be for the insurers to say they are liable for $9,000,

[1] Whitteridge *v.* Norris, 6 Mass. 125.

[2] Fisk *v.* Com. Ins. Co. 18 La. 77; Benecke & Stevens, (Phil. ed.) 374. In England, it is not customary to make this deduction when the ship is new, and on her first voyage. Fenwick *v.* Robinson, 3 Car. & P. 323; Weskett, tit. Repair, n. 1; Thompson *v.* Hunter, 2 Mood. & Rob. 51, n. In this country, it is well settled that there is no difference between new and old ships, in this respect. Nickels *v.* Maine Ins. Co. 11 Mass. 253; Dunham *v.* Com. Ins. Co. 11 Johns. 315. See also, *ante*, p. 465, n. 1.

[3] Reynolds *v.* Ocean Ins. Co. 22 Pick. 191; Benecke & Stevens, (Phillips's ed.) 384, 385.

[4] 2 Phillips on Ins. § 1432.

less one third,—that is, for $6,000,—and the old copper is ours by way of salvage; and as this is worth $3,000, we are in fact liable only for the balance, or $3,000.[1]

If an owner effects insurance on a part only of the value of the property insured,—as if for $5,000 on a ship valued at $10,000, —he is insured for half, and is his own insurer for the other half, and he recovers in the same proportion from the insurers in case of a partial loss. Thus, if there be a partial loss of sails and rigging, or of repairs, amounting, after one third is deducted, to $2,000, one half of this is the loss of the insurers, and one half is his own loss.[2]

The insurer takes no part of the risk of the market, and his liability is the same whether that rises or falls, although this may make a great difference as to the amount lost by the insured. What goods have lost from their original invoice value, is the amount which the insurer pays. Thus, if he insures $10,000 on goods of which that is the value, and they are so far damaged by a sea-peril, that at the port of discharge they bring, or are worth, only half of what they would have brought if they had not been damaged, the insurers are liable for $5,000, or that half, although the goods thus damaged may bring in the market of arrival, the whole of their invoice cost or more. And if they bring but a quarter of it, the insurers pay no more than one half because the rest of the loss is caused by the falling market.[3]

If the goods have sustained damage or loss by leakage, or by breakage, or by natural decay, or from inherent defect in quality, —that is, not by a sea-peril,—before the partial loss occurs, a proportional deduction should be made from the partial loss, as

[1] The rule that one third is to be deducted from the value of the old materials, does not seem to be founded on any principle of justice whatever. The sole question is, What is the cost of the repairs? The old materials have never passed to the underwriters, consequently they are not entitled to derive any benefit from them, and the one third is to be deducted from the balance remaining after deducting the old from the new materials. It is so held in New York, Byrnes *v.* Nat. Ins. Co. 1 Cowen, 265. And in Massachusetts, Brooks *v.* Oriental Ins. Co. 7 Pick. 259; Eager *v.* Atlas Ins. Co. 14 Pick. 141. See, also, for a discussion of this question, American Jurist, Vol. 5, p. 252; Vol. 6, p. 45.

[2] Stewart *v.* The Greenock Mar. Ins. Co. 2 House of Lords Cas. 159.

[3] In Lewis *v.* Rucker, 2 Burrow, 1172, Lord *Mansfield* says: "The nature of the contract is, that the goods shall come safe to the port of delivery, or, if they do not, to indemnify the plaintiff to the amount of the prime cost, or the value in the policy. If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience. The underwriter knows nothing of them." See also cases cited *ante*, p. 410, n. 9, and p. 412, n. 1.

the insurers are liable only for the injury resulting from that loss, and not for any part of that which already existed when the loss took place.[1]

SECTION XXVIII.

OF ADJUSTMENT.

An adjustment of an insurance loss, with all its incidents of general average, salvage, and the like, is usually made in all commercial cities, by persons whose profession it is to make them, and usually in a similar form, although the law prescribes no particular form or method.

They are instruments of much importance, because they generally are made and ought always to be made at the first port of discharge after the loss occurs; and an adjustment made there, in good faith, with a sufficient knowledge of the circumstances, and by persons properly employed to make it, is binding on all interests and parties.[2]

If the insurers refuse to pay a loss, they waive the adjustment, and the insured may present a new one, more favorable to themselves, if the law of insurance will sustain it.[3]

Our policies commonly contain a provision, that the loss shall be paid so many days after proof and adjustment of loss. But if the insurers refuse to pay, or dispute the claim, there need be no adjustment, either for trial, judgment, or execution.

If no repairs actually are made, but the loss which calls for repairs is to be adjusted, the third off—new for old—is to be deducted from the estimated cost of repair, in the same way in which it would have been from the actual cost.[4]

The insurers may sometimes be liable for more than a total loss, as in some cases of contribution, followed by a total loss; or where expenses were properly incurred by the insured, under

[1] See *ante*, p. 495, n. 3.

[2] Newman *v.* Cazalet, Park on Ins. 900; Strong *v.* New York Firemen's Ins. Co. 11 Johns. 323; Simonds *v.* White, 2 B. & C. 805; Dalglish *v.* Davidson, 5 D. & R. 6; Loring *v.* Neptune Ins. Co. 20 Pick. 411; Depau *v.* Ocean Ins. Co. 5 Cowen, 63; Shiff *v.* Louis. State Ins. Co. 18 Martin, 629 (6 N. S.); Thornton *v.* U. S. Ins. Co. 3 Fairf. 150.

[3] American Ins. Co. *v.* Griswold, 14 Wend. 399.

[4] See cases *ante*, p. 465, n. 1.

the provisions of the policy.[1] We should say, also, that there might be a partial loss repaired and paid for by the insurers, and then a total loss under the same policy, for which they would be liable, without having the right of demanding a deduction or set-off of what they had paid on the partial loss.[2]

Our policies provide, usually, that any unpaid premium, or other sums due from the insured, shall be deducted from the amount payable to the insured. Indeed, the common rules and practice of the law of set-off, would lead to a similar result. But the right is limited to demands which the insurers have against the insured himself, and is not extended to those which they may have against the agent employed by the insured, to effect the insurance.[3] The premium note frequently expresses that the insured will pay not only the premium, "but any premiums or balances due to the insurers," or uses other language to the same effect. Such a note is a valid contract, but although made payable to order, it cannot be, on general principles, a negotiable note; and, therefore, an indorsee must sue it in the name of the insurers, and be subject to equitable defence.[4]

[1] Barker *v.* Phœn. Ins. Co. 8 Johns. 307; Potter *v.* Prov. Wash. Ins. Co. 4 Mason, 298; Lawrence *v.* Van Horne, 1 Caines, 276; Jumel *v.* Mar. Ins. Co. 7 Johns. 412; M'Bride *v.* Mar. Ins. Co. 7 Johns. 431; Le Cheminant *v.* Pearson, 4 Taunt. 367.

[2] See Le Cheminant *v.* Pearson, 4 Taunt. 367. In Stewart *v.* Steele, 5 Scott's N. R. 927, it was held, that insurers were liable for a partial loss paid for re-coppering, and also for a subsequent total loss. See also Macarty *v.* Com. Ins. Co. 17 La. Rep. 365.

[3] In Hurlbert *v.* The Pacific Ins. Co. 2 Sumner, 471, an agent effected insurance for the benefit of whom it might concern, and after a loss, brought an action against the underwriters in his own name, for the benefit of the owners of the vessel. The court held, that the underwriters could not set off debts or demands due from the agent in his own right, against the amount claimed for the loss. Mr. Justice *Story* held, that by the common law, the right of set-off was limited to cases of mutual connected debts, and did not extend to debts unconnected with each other. See, also, Wiggin *v.* Suffolk Ins. Co. 18 Pick. 145.

[4] See *ante*, pages 86, 87, and notes.

CHAPTER XIX.

THE LAW OF FIRE INSURANCE.

SECTION I.

OF THE USUAL SUBJECT AND FORM OF THIS INSURANCE.

We have seen that fire is one of the perils insured against by the common marine policies. It is usual, however, to insure buildings, and personal property which is not to be water-borne, against fire alone; and this is what is commonly understood by Fire Insurance.

The general purposes and principles of this kind of insurance, are the same as those of marine insurance; and the law in respect to it differs only in those respects and in that degree in which the difference is made necessary by the subject-matter of the contract. It will be proper, therefore, to confine ourselves, in this chapter, mainly to the statement of these differences, and to consider those general principles which have already been discussed, only so far as this may be necessary for the comprehension or illustration of the peculiarities which belong to fire insurance.

This kind of insurance is sometimes made to indemnify against loss by fire, of ships in port;[1] more often of warehouses, and mercantile property stored in them; still more frequently of personal chattels in stores, or factories, in dwelling-houses, or barns, as merchandise, furniture, books, and plate, or pictures, or live stock. But by far the most common application of this mode of insurance is to dwelling-houses.

[1] The insurance on a ship, "on the stocks building," includes the materials which are so far wrought as to be in a condition to be framed, and are actually incorporated into the parts on the stocks, and which were in a proper place to be conveniently applied to that use, and by reason of such adaptation had become valueless for other purposes. Hood *v.* Manhattan Fire Ins. Co. 2 Duer, 191.

Like marine insurance, it may be effected by any individual who is capable of making a legal contract. In fact, however, it is always, or nearly always in this country, and we suppose elsewhere, made by companies.

There are stock companies, in which certain persons own the capital and take all the profits by way of dividends. Or mutual companies, in which every one who is insured becomes thereby a member, and the net profits, or a certain proportion of them, are divided among all the members in such manner as the charter or by-laws of the company may direct. Or both united, in which case there is a capital stock provided, as a permanent guaranty fund, over and above the premiums received, and a certain part or proportion of the net profits is paid by way of dividend upon this fund, and the residue divided among the insured.

Of late years the number of mutual fire insurance companies has greatly increased in this country, and probably by far the largest amount of insurance against fire is effected by them. The principal reason for this is, undoubtedly, their greater cheapness; the premiums required by them being, in general, very much less, in fact, than in the stock offices. For example, if the insurance is effected for seven years, which is a common period, an amount or percentage is charged, about the same as, or a little more than is charged by the stock companies. Only a small part of this is taken in cash; for the rest a premium note or bond is given, promising to pay whatever part of the amount may be needed for losses which shall occur during the period for which the note is given. More than this, therefore, the insured cannot be bound to pay, and it frequently happens that no assessment whatever is demanded; and sometimes where the company is well established and does a large business upon sound principles, a part of the money paid by him is refunded when the insurance expires, or credited to him on the renewal of the policy if such be his wish.[1]

[1] A policy issued by a mutual insurance company, and a premium note given at the same time, for the payment of assessments, are independent contracts, and a vote by such a company that if the assessments upon its premium notes should not be punctually paid, the insurances previously made, should be suspended, is of no validity, unless assented to by the insured. New England Mutual Fire Ins. Co. *v.* Butler, 34 Maine, 451. Where the policy has been rendered void by a transfer of interest, the insured is personally liable on the premium note, until an actual surrender of the policy, and the

The disadvantage of these mutual companies is, that the premiums paid and premium notes, constitute the whole capital or fund, out of which losses are to be paid for. To make this more secure, it is provided by the charter of some companies, that they should have a lien on the land itself on which any insured building stands, to the amount of the premium. But while this adds very much to the trustworthiness of the premium notes, and so to the availability of the capital, it is, with some persons, an objection, that their land is thus subjected to a lien or incumbrance.

There is another point of difference which recommends the stock rather than the mutual company. It is that the stock company will generally insure very nearly the full value of the property insured, while the mutual companies are generally restrained by their charters from insuring more than a certain moderate proportion, namely, from one half to three fourths, of the assessed value of the property. It would follow, therefore, that one insured by a mutual company, cannot be fully indemnified against loss by fire; and may not be quite so certain of getting the indemnity he bargains for, as if he were insured by a stock company. But this last reason is, practically, of very little importance, and the lowness of the premiums effectually overcomes the other.

The method and operation of fire insurance have become quite uniform throughout this country; and any company may appeal to the usage of other companies to answer questions which have arisen under its own policy; only, however, within certain rules, and under some well-defined restrictions. In the first place, usage may be resorted to for the purpose of explaining that which needs explanation, but never to contradict that which is

payment of all assessments against him for losses sustained before the surrender. Indiana Mutual Fire Ins. Co. *v.* Coquillard, 2 Carter, (Ind.) 645. So the insured is liable for premiums during the whole term of the insurance, even though there was a previous loss, unless there is something in the policy, charter or by-laws, or premium note, showing a different contract or discharge. N. H. Mutual Fire Ins. Co. 4 Foster, 428; Swamscot Machine Co. *v.* Partridge, 5 id. 369. Where the charter and by-laws of the company provide for assessments in case of losses not to exceed the amount of the premium notes, it was held that without such losses no recovery could be had on the notes, although absolute on the face. Insurance Co. *v.* Jarvis, 22 Conn. 133. It has been held that where the policy of a mutual insurance company becomes *ipso facto* void by an alienation, a member will not be liable for assessments for losses occurring after an alienation. Wilson *v.* Trumbull Mutual Fire Ins. Co. 19 Penn. Stat. 372. The giving of the premium note is not necessary to the consummation of the contract of insurance. Blanchard *v.* Waite, 28 Maine, 51.

clearly expressed in the contract.[1] And no usage can be admitted even to explain a contract, unless the usage be so well established and so well known, that it may reasonably be supposed that the parties entered into the contract with reference to it. Thus if, under a policy against fire on a vessel in one port of this country, an inquiry is raised as to the local usage, the policy is not to be affected by proof of usage upon any particular matter in other ports of the world, or even of the United States.[2] And not only the terms of the contract must be duly regarded, but those of the charter; thus, if this provides, that "all policies and other instruments made and signed by the president, or other officer of the company, shall bind the company," an agreement to cancel a policy should be so signed;[3] although it cannot be doubted that a party insured might otherwise give up his policy, or renounce all claim under it, and that a valid agreement to that effect between him and the company would not be set aside for his benefit, on the ground of a merely formal defect.

[1] 2 Parsons on Contracts, 48, n. (y,) 49, n. (z,) 55, n. (f); Blackett *v.* Royal Exchange Assurance Co. 2 Crompt. & Jerv. 244; The Schooner Reeside, 2 Sumner, *Story*, J., 569, 570; Illinois Mutual Fire Ins. Co. *v.* O'Neile, 13 Illinois, 89. Evidence of usage in New York for the insured to give notice of any increase of risk by his act, to the insurer, who is then to have the option of continuing or annulling the policy, is inadmissible, for the double reason that it is local, and would besides alter the legal operation and effect of the policy. Stebbins *v.* Globe Ins. Co. 2 Hall, (N. Y.) 632. Where the company promised the insured that their directors "shall settle and pay (to him) all losses, within three months after notice shall have been given as aforesaid," "and that the payment of the loss ascertained shall be made within the time prescribed by the charter, without deduction from the sum decreed by the charter," it was held that proof of a custom or usage on the part of the company, in case of a total loss, to retain of the amount of the ascertained loss, two per cent. per month on the balance of the premium note, from the date of the last assessment upon it, until the expiration of the term of the policy, was inadmissible, the effect being to limit and control the clear and unequivocal terms of an express contract. Swamscot Machine Co. *v.* Partridge, 5 Foster, N. H. 369. But where the loss was occasioned by lightning, it was held that the usage of other insurance companies restricting their liability to losses occasioned by lightning, may be resorted to to show what the general usage is in regard to losses caused by lightning. Babcock *v.* Montgomery Mutual Ins. Co. 6 Barb. 637. A general usage which contradicts a settled rule of commercial law, is not admissible. Thus evidence of a usage in the city of New York, by which the re-assurer pays the same proportion of the entire loss sustained by the original assured, that the sum re-insured bears to the first insurance written by the re-assured, was rejected. Hone *v.* Mutual Safety Ins. Co. 1 Sandford, 137; 2 Comst. 235. And parol evidence, generally, is not admissible to vary or contradict the terms of the policy. Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Metc. 211; Finney *v.* Bedford Commercial Ins. Co. 8 id. 348; Stacey *v.* Franklin Fire Ins. Co. 2 W. & S. 506. But proof of the enlargement of the time of performance is admissible. Franklin Fire Ins. Co. *v.* Hamill, 5 Maryland, 170.

[2] Mason *v.* Franklin Fire Ins. Co. 12 G. & Johns. 468; Stebbins *v.* Globe Ins. Co. 2 Hall, 632; Child *v.* Sun Mutual Ins. Co. 3 Sandf. 47.

[3] Head *v.* Providence Ins. Co. 2 Cranch, 127; Beatty *v.* Marine Ins. Co. 2 Johns. 109. Where by the uniform practice of an insurance company, a deviation from the risk assumed in the policy is waived by the president, for a compensation agreed

In regard to the execution of a fire policy, and what is necessary to constitute such execution, — as, for example, whether delivery is necessary, or a signed memorandum be sufficient, or, indeed, an oral bargain only, and whether this insurance may be effected by correspondence, and if so, when the proposition and assent complete the contract, — we are not aware of any material difference, on any of these points, between the law of fire insurance and that which has already been presented as applicable to marine insurance.[1] It has been held in an action on a

upon by him and by the assured, the waiver and assent, with the terms thereof, are written across the policy, without any new signature, and recorded by the secretary; a contract made in this manner is binding on the corporation. Warner *v.* Ocean Ins. Co. 16 Maine, 439.

[1] When the offer to insure has been accepted, and the applicant has complied with all the conditions imposed, the risk commences, although the policy has not been issued. Thus the plaintiff, having an interest in a building, applied to the agent of a mutual company for an insurance, and at the same time made the necessary cash payment and executed the premium note. The application being transmitted to the company, an alteration in the building was directed, and an authority required from the trustees of the building to effect the insurance. This was communicated to the plaintiff by the secretary, who stated when the company were duly certified, that these had been complied with, a policy would be sent. The conditions were complied with, and the agent notified, and the agent requested to call and examine; but he neglected to do so. It was held that the risk commenced from the notification of compliance with the terms of the conditional agreement. Hamilton *v.* Lycoming Ins. Co. 5 Barr. 339; Andrews *v.* Essex Fire and Marine Ins. Co. 3 Mason, 6; Kohne *v.* Ins. Co. 1 Wash. C. C. 93; Palm *v.* Medina Fire Ins. Co. 20 Ohio, 529; Blanchard *v.* Waite, 28 Maine, 51. Where the agreement to insure is complete, equity will compel the execution of a policy, or if a loss have occurred, decree its payment. Perkins *v.* Washington Ins. Co. 4 Cowen, 645; Lightbody *v.* North American Ins. Co. 23 Wend, 18; Carpenter *v.* Mutual Safety Ins. Co. 4 Sandf. Ch. 408; Suydam *v.* Columbus Ins. Co. 18 Ohio, 459; Neville *v.* Mer. and Man. Ins. Co. 19 id. 452. Where the offer of the company by letter to insure is accepted in due season, the contract is complete by a deposit of their letter of acceptance in the mail before notice of its withdrawal has been received by the other party. Tayloe *v.* Merchants' Fire Ins. Co. 9 Howard, 390. The facts of the case are briefly as follows: John Minot, the agent of the company at Fredericksburg, at the request of Tayloe, who was about leaving for Alabama, made application for an insurance on his dwelling-house, to the amount of $8,000, for one year. This application was dated 25th Nov. 1844. A reply from the defendants was received, under the date 30th Nov. 1844. On the 2d Dec. Minot wrote to Tayloe, informing him of their willingness to effect the insurance, stating terms, &c., and added, "Should you desire to effect the insurance, send me your check, payable to my order, for $57, and the business is concluded." But in consequence of a misdirection of the letter, it did not reach Tayloe till the 20th. On the next day, the 21st, Tayloe mailed a letter, accepting the terms, and remitting a check for the premium, with a request that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received by Minot on the 31st Dec., and upon the 1st of Jan. 1845, he wrote to Tayloe, communicating his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the house having been burned on the 22d Dec. The company confirmed the view of the case taken by their agent, and refused to issue the policy or pay the loss. The court below passed a decree that the case should be dismissed with costs, and upon appeal to the Supreme Court, it was held that the decree should be reversed. See, also, Mactier *v.* Frith, 6 Wend, 103; Hamilton *v.* Lycoming Mutual Ins. Co. 5 Barr. 339; Palm *v.* Medina Fire Ins. Co. 20 Ohio, 529. The case of McCullock *v.* Eagle Ins. Co. 1 Pick. 278, which allows the insurer to retract at any time until the notice of acceptance has been received by him, is effectually overruled by the above cases. But no contract subsists

fire policy, as doubtless it would be on a marine policy, that a memorandum made on the application book of the company by the president, and signed by him, was not binding where the party to be insured wished the policy to be delayed until a different adjustment of the terms could be settled, and after some delay was notified by the company to call and settle the business, or the company would not be bound, and he did not call; because there was here no consummated agreement.[1] So, too, a subsequent adoption or ratification is equivalent, either in a fire or marine policy, to the making originally of the contract; with this limitation, however, that no party can, by his adoption, secure to himself the benefit of a policy, if it had not been intended that his interest should be embraced within it.[2] It is quite common to describe the insured in marine policies, by general expressions — as, "for whom it may concern," or "for owners," or the like; but such language is seldom if ever used in fire policies, the insured being specifically named in them.[3]

It may be remarked that the effecting of a fire insurance is not so often done through the agency of a broker, as that of marine insurance; nor is it so usual to pay nothing down, but to give a note for the whole premium. If, however, an insurance company has an express rule to that effect, it may be waived; and this waiver may be express or implied, from the conduct of officers of the company who have the right to act for it. And their admissions bind the company.[4]

between the parties, where the policy issued by the company varies from the offer of the applicant. Ocean Ins. Co. *v.* Carrington, 3 Conn. 357. See a recent and interesting case on this question. Kentucky Mut. Ins. Co. *v.* Jenks, 5 Porter, (Ind.) 96, of which we give the facts and decision in the notes to the chapter on Life Insurance.

[1] Sandford *v.* Trust Fire Ins. Co. 11 Paige, 547. Where written applications for insurance had been made, and the rates of premium agreed upon, and when the policies were made out the applicant refused to take them or sign the deposit notes, and the policies remained in the possession of the company, it was held that there was no completed contract, which would sustain an action against the applicant on the deposit notes. Real Estate Mut. Fire Ins. Co. *v.* Roessle, 1 Gray, (Mass.) 336; Lindauer *v.* Delaware Mutual Safety Ins. Co. 8 English, (Ark.) 461. So, where the buildings were burned, while the proposal of the company and the acceptance of the applicant remained in the possession of the agent of the latter, the company was held not to be liable. Thayer *v.* Middlesex Mutual Fire Ins. Co. 10 Pick. 326. Where the applicant is notified that the payment of the premium is a condition precedent to the taking effect of the insurance, no contract subsists while it remains unpaid. Flint *v.* Ohio Ins. Co. 8 Ohio, 501; Berthoud *v.* Atlantic Ins. Co. 13 Louis. 539.

[2] De Bollé *v.* Pennsylvania Ins. Co. 4 Whart. 68.

[3] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 112. See Alliance Marine Ins. Co. *v.* La. State Ins. Co. 8 Louis. 11.

[4] In The Trustees of the First Baptist Church in Brooklyn and others *v.* The Brooklyn Fire Insurance Company, 18 Barbour, (S. C.) 69, it was held that an insurance

SECTION II.

OF THE CONSTRUCTION OF POLICIES AGAINST FIRE.

The rules of construction are generally the same in reference to fire policies as to marine policies. It is sufficient if the words of the policy describe the persons, the location, and the property, with so much distinctness that the court and jury have no difficulty in determining their identity with a certainty which prevents any real and substantial doubt. Perhaps some of the cases which we cite in our notes to this section, will show that courts have gone quite far enough in recognizing such description as sufficient.

In the construction of this as of other contracts, the intention of the parties is a very important and influential guide; but it must be the intention *as expressed;* for otherwise a contract which was not made, would be substituted for that which was made; and evidence *de hors* the contract would be permitted to vary and to contradict it.[1] But even to this limitation there are

company may waive its general rule requiring premiums to be paid before policies shall take effect, and give credit for a premium until called for; and that the president and secretary of an insurance company are the officers to whom the preliminary proofs of loss are to be presented, and if, on being notified of a loss, they admit that they had agreed to insure the property, or to keep it insured, it is a statement made in the course of their duties, and binds the company as much as their certificate of premium paid, and of a renewal, would bind the company.

[1] Where stock in trade, household furniture, linen, wearing apparel, and plate were insured, in a policy, Lord *Ellenborough* held, on the principle of *noscitur a sociis,* that the terms "linen" must be confined to "household linen," and would not include linen drapery goods purchased on speculation. Watchorn *v.* Langford, 3 Camp. 422. Where the policy required that the houses, buildings, or other places where goods are deposited and kept, shall be truly and accurately described, and the place was described as the dwelling-house of the insured, whereas he occupied only one room in it, as a lodger, this description was held sufficient, the condition relating to the construction of the house, and not to the interest of the parties in it. Friedlander *v.* London Assurance Co. 1 M. & Rob. 171. See Dobson *v.* Sotheby, 1 Mood. & Mal. 92. The insurance by an innkeeper against fire of his "interest in the inn and offices," does not cover the loss of profits during the repair of the damaged premises. *In re* Wright, 1 Ad. & El. 621 The terms "stock in trade," when used in a policy of insurance in reference to the business of a mechanic, as a baker, include not only the materials used by him, but the tools, fixtures, and implements necessary for the carrying on of his business, and the terms in question were held to have a broader application to the business of mechanics than to that of merchants. Moadinger *v.* Mechanics' Fire Ins. Co. 2 Hall, 490. Capstans of locust, partly prepared for vessels, which the insured was building, were held to be within his policy "on his stock of ship timber, including locust, &c." Webb *v.* National Fire Ins. Co. 2 Sandf. 497. Where a policy of insurance for $1,800 on a grist mill, and $700 on machinery therein, was renewed in general terms for the sum of $2,500, without making any distribution of the risk, it was held that it was the intention of the parties for the insurance thereafter to be without any distribution of

exceptions; for if it appears by clear and positive evidence, that the written contract does not express the actual and certain agreement of the parties, by reason of an accidental mistake or omission of phraseology, a court of equity will correct this mistake;[1] and even courts of law may admit evidence of such mistake and treat the policy as reformed accordingly.[2] We are not aware, however, of any material difference in this respect between fire policies and marine policies, and the law on this subject in relation to them has already been stated.[3] And the same remark may be extended to the rule respecting the admission, as a part of the contract, of a memorandum on the back of the policy, or attached to it by a wafer, and neither referred to in the policy itself, nor signed by the insurer.[4]

the risk, and should apply generally to both the building and the machinery. Driggs *v.* Albany Ins. Co. 10 Barb. 440. The insurance on "a ship on the stocks building," includes the materials which are so far wrought as to be in a condition to be framed, and are actually incorporated into the parts on the stocks, and which were in a proper place to be conveniently applied to that use, and by reason of such adaptation had become valueless for other purposes. Hood *v.* Manhattan Fire Ins. Co. 2 Duer, 191. See Stacey *v.* Franklin Fire Ins. Co. 2 W. & S. 545; Mason *v.* Franklin Ins. Co. 12 G. & J. 468; Nicolet *v.* Insurance Co. 3 Louis. 371. Where the plaintiff took out a policy of insurance against fire, "on his goods, stock in trade, &c." the policy was held to cover goods in stores, bought on joint account, and sold for the mutual profit of the insured and another person, the former being also in advance on the adventure. Millaudon *v.* Atlantic Ins. Co. 8 Louis. 557. An application by a tenant of a building during one year, for an insurance on "his building," is a good description. Niblo *v.* N. Am. Fire Ins. Co. 1 Sandf. 551; Clarke *v.* Firemens' Ins. Co. 18 Louis. 431; Franklin Ins. Co. *v.* Drake, 2 B. Monr. 51. A policy on an unfinished house covers materials got out for and deposited in it, but not materials got out for it and deposited in another building, Ellmaker *v.* Franklin Fire Ins. Co. 5 Barr. (Penn.) 183. A policy upon wearing apparel, household furniture, and the stock of a grocery, covers linen sheets and shirts actually laid in for family use, if exhibited at the preliminary inspection, and such as were laid in for sale or traffic in the usual way, in the store; but not such as, being smuggled, were concealed and intended for secret sale. Clary *v.* Protection Ins. Co. 1 Wright, (Ohio,) 228. In a policy on a store and stock of goods, for the period of six years, notwithstanding a provision making it void in case of alienation, it was held that it would attach to any goods the insured might have in the store at any time within the six years, not exceeding the amount insured. Lane *v.* Maine Mutual Fire Ins. Co. 3 Fairfield, 45; Hooper *v.* Hudson River Fire Ins. Co. 15 Barb. 413. A policy will be void for uncertainty, where it cannot be determined to which of two buildings it applies, but where it evidently applies to one of the two, it will be held to apply to that one, which, after rejecting as surplusage that part of the description which is false when applied to it, is most clearly, and at the same time sufficiently, identified. Heath *v.* Franklin Ins. Co. 1 Cush. 257.

[1] See *ante*, p. 491, n. 1, and p. 494, n. 1. Facts and circumstances outside the instrument may be proved to show the intention of the parties. Stacey *v.* Franklin Fire Ins. Co. 2 W. & S. 547. Extrinsic evidence is admissible to prove representations, when they are referred to in the policy. Clark *v.* Manufacturers' Ins. Co. 8 How. 234.

[2] Motteux *v.* London Assurance Co. 1 Atk. 545; Collett *v.* Morrison, 12 Eng. Law & Eq. 171; Graves *v.* Boston Marine Ins. Co. 2 Cranch. 419; Ewer *v.* Washington, 16 Pick. 503; Dow *v.* Whitten, 8 Wend. 166.

[3] See *ante*, p. 403, sec. 1.

[4] Moliere *v.* Pennsylvania Fire Ins. Co. 5 Rawle, 342; Dow *v.* Whitten, 8 Wend. 166.

There is, however, one very important difference between contracts of fire insurance, and those of marine insurance, as usually made. It is a general rule with our mutual insurance companies, that every one who is insured becomes a member of the company. Indeed, the principle upon which this kind of insurance rests, is that all the insured insure each other. Every insured person is, then, an insurer of all the rest, as they are of him. And it follows, necessarily, that every insured party is bound by all the laws and rules of the company, as by laws and rules of his own making.[1] This would be equally true of marine policies as of fire policies. There is, however, this difference in practice. The mutual fire insurance companies, by a law or rule which is perhaps universal, require that an application should be made in writing; and this written application is after a peculiar form, prescribed by the rules. It always contains certain definite statements, which relate to those matters which effect the risk of fire importantly. In each form of application sundry questions are put, which are quite numerous and specific, and are those which experience has suggested as best calculated to elicit all the information needed by the insurers, for the purpose of estimating accurately the value of the risk they undertake. Specific answers must be given to all these questions. And this application, with all these statements, questions, and answers, is expressly referred to in the policy, and made a part of the contract;[2] and a distinct reference to such a paper might of itself incorporate it with the contract, without any words declaring it to be a part thereof,[3]

[1] Pawon *v.* Barnevelt, 1 Doug. 12, note 4; Bize *v.* Fletcher, id. 13, note. A paper purporting to be "conditions of insurance," if annexed to and delivered with a fire policy, is deemed, *primâ facie*, a part of it, although the policy do not contain any express reference to such paper. Roberts *v.* Chenango Co. Mutual Ins. Co. 3 Hill, 501; Murdoch *v.* Chenango Co. Mutual Ins. Co. 2 Comst. 210; Sexton *v.* Montgomery Co. Mutual Ins. Co. 9 Barb. 201.

[2] Susquehanna Ins. Co. *v.* Perrine, 7 W. &. S. 348; Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Metc. 211; Smith *v.* Bowditch Mutual Fire Ins. Co. 6 Cush. 448; McMahon *v.* Portsmouth Mutual Fire Ins. Co. 2 Foster, 15.

[3] Where the policy insures certain property as described, or more particularly described on the application, such a reference is not sufficient to make the application a part of the policy and give it the effect of a warranty, and it is sufficient if it be not false in any material point. Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72; Snyder *v.* Farmers' Ins. Co. 13 Wend. 92; S. C. 16 id. 481; Delonguemare *v.* Tradesmens' Ins. Co. 2 Hall, 611; Stebbins *v.* Globe Ins. Co. 2 id. 632; Burritt *v.* Saratoga Co. Mutual Fire Ins. Co. 5 Hill, 190; Wall *v.* Howard Ins. Co. 14 Barb. 383; Insurance Co. *v.* Southard, 8 B. Monr. 634. But see Sillem *v.* Thornton, 26 Eng. L. & Eq. 238. Where the application is referred to "as forming a part of the policy," it will have the effect of a warranty. Burritt *v.* Saratoga Co. Mutual Fire Ins. Co. 5 Hill, 188; Williams *v.* N. E. Mutual Fire Ins. Co. 31 Maine, 224; Murdock *v.* Chenango Co. Mutual Ins. Co.

if this reference imported that the contract was based upon the paper. If such a paper be referred to, the court will inquire into the purpose of the reference; and it has been said that any conditions so referred to would be taken to be a part of the policy; but that the application itself was merely for the purpose of describing and identifying the property.[1] It is common to state in the printed part of the formal application that it is made on such and such conditions; and these usually follow those statements which are deemed the most material in estimating the risk. These would be considered as technical conditions, and therefore the substantial truth of all of them is a *condition precedent* to any right of indemnity in the insured party.[2]

Sometimes there is no distinct application in writing, but the policy itself states the facts relied upon. For this purpose it contains many blanks, which are filled up according to the circumstances of each case. It may happen that what is written in these places may be inconsistent with what is printed; and then it is a general rule that what is written prevails, as that is more immediately and specifically the act of the parties, and may be supposed to express their precise purpose better than the printed phrases which were prepared without especial reference to this case.[3] But this rule would not be applied where it would obviously operate injustice.

2 Comst. 210; Sexton *v.* Montgomery Co. Mutual Ins. Co. 9 Barb. 200; Kennedy *v.* St. Lawrence Co. Mutual Ins. Co. 10 Barb. 285; Egan *v.* Mutual Ins. Co. 5 Denio, 326; Gates *v.* Madison Co. Mutual Ins. Co. 1 Selden, 469.

[1] Where, in the policy, this clause occurred, "reference being had to the application of A B for a more particular description of the conditions annexed, as forming a part of this policy," *Beardsley*, J., said: "The conditions are thus undoubtedly made a part of the contract of insurance; as much so as if embodied in the policy. But it is otherwise with the application. That, as it seems to me, is referred to for the mere purpose of describing and identifying the property insured, and not to incorporate its statements into the policy as parts thereof." Trench *v.* Chenango Co. Mutual Ins. Co. 7 Hill, 124. But, *contra*, Jennings *v.* Chenango Co. Mutual Ins. Co. 2 Denio, 75. In Sheldon *v.* Hartford Fire Ins. Co. 22 Conn. 235, where the policy referred to the survey in these words: "Reference is had to survey No. 83, on file at the office of the Protection Insurance Company," and the survey consisted of answers to questions, some of which were intended to draw forth a minute description of the premises, and others to enable the insurer to estimate the risk, it was held that the reference to the survey was not merely for a fuller description, but for the purpose of incorporating all the survey into the policy.

[2] Wood *v.* Hartford Fire Ins. Co. 13 Conn. 533; Egan *v.* Mutual Ins. Co. 5 Denio, 326; Farmers' Ins. Co. *v.* Snyder, 16 Wend. 481. The proposals and conditions attached to a policy form part of the contract, and have the same force and effect as if contained in the body of the policy. Duncan *v.* Sun Fire Ins. Co. 6 Wend. 488.

[3] Robertson *v.* French, 4 East, 136, per Lord *Ellenborough*, C. J.; Alsager *v.* St. Katharine's Dock Co. 14 M. & W. 794; Coster *v.* Phœnix Ins. Co. 2 Wash. C. C. 51; Cushman *v.* N. W. Ins. Co. 34 Maine, 487.

It is also usual in fire insurance, to put upon the policy itself a scale of premiums, as calculated upon different classes of buildings, of stocks in trade, or other property, in conformity with what is thought to be the greater or less risk of fire in each case. This is a matter of special importance; and if a statement were made by an applicant which put his building or property into a class of which the risk and premium were less than for the class to which the building or property actually belonged, and in that way an insurance was effected at such less premium, the policy would undoubtedly be void, although the false statement were made innocently.[1]

When certain trades or occupations, or certain uses of buildings, or kinds and classes of property, are enumerated as "hazardous," or otherwise specified as peculiarly exposed to risk, the rule *Expressio unius, exclusio est alterius*, is applied, and sometimes with severity. This is better illustrated by marine insurance; but the same rule would be applied, for the same reason and in the same way to cases of fire insurance.[2]

If the printed conditions represent one class of buildings, or

[1] Fowler *v.* Ætna Fire Ins. Co. 6 Cowen, 673; S. C. 7 Wend. 273; Wood *v.* Hartford Fire Ins. Co. 13 Conn. 533; Newcastle Fire Ins. Co. *v.* Macmorran, 3 Dow, 255. In this case, it was held that whether the misrepresentation was material or not, whether the risk on the one hand was as great as on the other, were questions which had nothing to do with the case. But see Farmers' Ins. and Loan Co. *v.* Snyder, 16 Wend. 481.

[2] N. Y. Equitable Ins. Co. *v.* Langdon, 6 Wend. 623, 627, *Sutherland*, J.: "It was an express provision of the policy in this case, that if the building insured should at any time during the continuance of the policy, be appropriated, applied, or used, to or for the purpose of carrying on, or exercising therein any trade, business, or vocation, denominated hazardous, or extra-hazardous, or specified in the memorandum of special rates in the proposals annexed to the policy, or for the purpose of storing therein any of the articles, goods, or merchandise, in the same proposals denominated hazardous or extra-hazardous, or included in the memorandum of special rates, the policy should cease, and be of no force or effect. The trade or business of a grocer is not mentioned or specified in the proposals annexed to the policy. It was not, therefore, a prohibited trade. *Expressio unius, exclusio est alterius.* The enumeration of certain trades, or kinds of business, as prohibited on the ground of being hazardous, is an admission that all other kinds are lawful under the contract. The case of Baker *v.* Ludlow, 2 Johns. Cas. 288, is precisely in point. There dried fish were enumerated in the memorandum clause as free from average, and all other articles perishable in their own nature. It was held that the naming of one description of fish implied that other fish were not intended; and that the subsequent words, 'all other articles perishable in their own nature,' were not applicable to the articles previously enumerated, and did not repel the implication arising from the enumeration of them. In Doe, *ex dem.* Pitt *v.* Laming, 4 Camp. 76–7, Lord *Ellenborough* held that a coffee-house was not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an innkeeper with others, as double hazardous, and not covered by the policy. If the business of a grocer is not prohibited under the policy, the ordinary incidents of that business, it would seem, were allowable; not being prohibited, the party had a right to keep a grocery-store, and to conduct it in the usual manner. The cases of Suckley *v.* Furse, 15 Johns. R. 342, and Kensington *v.* Inglis, 8 East, 273, sanction this principle."

goods or property, as more hazardous than another, it could not be competent for the insured to prove by other testimony that it was not so in fact.[1] Moreover, a description of the property insured, as it is a description *for* a contract on time, is held to

[1] Newcastle Fire Ins. Co. Macmorran, 3 Dow, 255; Farmers' Ins. Co. *v.* Snyder, 16 Wend. 490; Richards *v.* Protection Ins. Co. 30 Maine, 273. It was held in Westfall *v.* Hudson River Fire Ins. Co. 2 Duer, 490, that where a clause in a policy of insurance against fire, declared that "camphene," &c., when used in stores or warehouses as a light, subjects the goods therein to an additional charge of ten cents per hundred dollars, and permission for such use must be indorsed on the policy, that the words were not a conditional prohibition of the use of camphene, but merely exempted the insurers from liability for a loss resulting from such use, unless the additional charge had been paid. A late case in England, overrules the doctrine which has been asserted there on the authority of earlier cases, that if there be an insurance against fire upon a house which is described in the policy as being of a particular specified description, and in which it is stated that the occupier carries on a certain specified trade — this being true at the date of the policy, the assured preserving the identity of the house, may alter its construction, so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. A fire policy was procured for one year on a "brick building used as a dwelling-house and store, (described in a paper attached to this policy,) situated at, &c. The description annexed, stated that the house was composed of two stories of given height, and materials with a given roof, and given means of obtaining water, &c. During the year, the house was altered by adding to it an additional story, but so that the alterations did not increase the hazard or probability of fire, except so far, if it all, as the increase of the area of the building by a third story may be considered to have necessarily increased such hazard, or probability; and, afterwards, during the year, the house was totally burned. It was held that the underwriter was not liable; for the description was by reference incorporated into the policy and amounted to a warranty not only that the building was as described at the time the description was given and at the date of the policy, but that it would not be altered by the assured so as to increase the risk during the year, and that it had been so altered. Sillem *v.* Thornton, 26 Eng. Law and Eq. (C. B.) 238, 243. Lord *Campbell*, C. J.: "But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do any thing to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and if he does take it, what premium he shall demand. The assured, no doubt, wished him to understand, that not only such was the condition of the premises when the policy was to be effected, but, as far as depended upon them, it should not be altered so as to increase the risk during the year for which he was to be liable if a loss should accrue. Without such assurance and belief, the statement introduced into the policy of the existing condition of the premises, would be a mere delusion. Identity might continue, and yet the quality, condition, and incidents of the subject-matter insured might be so changed as to increase tenfold the chances of loss, which, upon a just calculation, might reasonably be expected to fall upon the underwriter. Can it be successfully contended that, having done so, the assured retain a right to the indemnity for which they had stipulated upon a totally different basis? With respect to marine policies, we conceive that if there be a warranty of neutrality, or of any other matter which continues of importance till the risk determines, whether the policy be for a voyage or for a time certain, such a warranty is continuous; and if it be broken by the default of the assured, the underwriter is discharged. The implied warranty of seaworthiness applies only to the commencement of the voyage; but even here, if the assured, during the voyage, were voluntarily to do any act whereby the ship was rendered unseaworthy, and thereby a loss were to accrue, we conceive that they would have no remedy on the policy. A distinction, however, is taken in this respect between marine policies and insurances of houses

amount to an agreement that the property shall continue within the class where it is put, or at least shall not enter into another that is declared to be more hazardous, during the operation of the policy.[1] There must, however, be a rational, and perhaps a

against fire. It would probably be allowed that, if during the war there were a policy on a merchant ship described as carrying ten guns, and employed in the coal trade, and after the policy was effected, the owner should reduce her armament to five guns, or load her with oil of vitriol, the underwriter would not be liable for a subsequent loss. But it is strenuously asserted that, if there be an insurance against fire upon a house, which is described in the policy as being of a particular specified description, and in which it is stated that the occupier carries on a certain specified trade — this being true at the date of the policy, the assured, preserving the identity of the house, may alter its construction, so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. This seems quite contrary to the principles on which contracts are regulated. The construction and use of the premises insured, as described in the policy, constitute the basis of the insurance, and determine the amount of the premium. But this calculation can only be made upon the supposition that the description in the policy shall remain substantially true while the risk is running, and that no alteration shall subsequently be made by the assured to enhance the liability of the insurer. It seems strange, then, that if a house be described in the policy as occupied by the owner, carrying on the trade of a butcher, so that the premium is on the lowest scale, he may immediately afterwards, merely taking care that the walls and floor and roof remain, so that it is still the same identical house, convert it into a manufactory of fire-works, a trade trebly hazardous, for which the highest scale of premium would be no more than reasonable for the stipulated indemnity. . . . Now, assuming the law to be that, upon an insurance against fire there is an implied engagement, that the assured will not afterwards alter the premises so as that they shall not agree with the description of them in the policy, and so that thereby the risk and liability of the insurer shall be increased, we have only to consider whether, in this instance, the assured have not done so by converting the house insured from 'a house composed of two stories' into a house composed of three stories; and, this really admits of no reasonable doubt. Mr. Bramwell very candidly admitted that, if the policy remained in force after the alteration, it covered the third story, as well as the other two. This being so, the increase of the area of the building by a third story, must be considered by the court to have necessarily increased the hazard or probability of fire about as much as if the addition to the house had been lateral instead of vertical." In Pim *v.* Reid, 6 Man. & Gran. 1, where the policy was effected on condition that if any person shall insure his goods or buildings, and cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they have undertaken, or are required to undertake, such insurance shall be of no force; it was held that this condition was to be referred to the time when the policy was effected, and that in the absence of fraud, neither by the general law of insurance nor by such condition, was the policy avoided by the circumstance that, subsequently to effecting the policy, a more hazardous trade had, without notice to the company, been carried on upon the premises.

[1] Where, in a policy insuring a stock of dry goods, it is provided that the policy shall be void, if "the risk shall be increased by any means whatever within the control of the assured; or if such building or premises shall, with the consent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring." And among the articles denominated hazardous, is cotton in bales; yet if cotton in bales is merely kept for sale as a part of the stock of dry goods, it does not vitiate the policy, unless the jury should find that the keeping of such cotton increases the risk. Moore *v.* Protection Ins. Co. 29 Maine, 97. Where, in a policy of insurance, on sundry buildings, they were described as barns, to which this clause was added: "All the above-described barns are used for hay, straw, grain unthreshed, stabling, and shelter," and on the trial after proof of a loss by fire, it appeared that on the day pre-

liberal construction of this rule. Thus, it does not apply where a single article, or one or two, are kept in a store as a part of the stock of goods, although that article, as cotton in bales, is among those enumerated as hazardous.[1] But if the building is generally

ceding the night of the fire, the insured had caused about two bushels of lime and six or eight pails of water to be placed in a tub standing in a room generally used for keeping therein unthreshed corn, in one of the barns, for the purpose of preparing the lime for rolling in it some wheat which he was about to sow on his farm; that a short time previous to the fire, he had commenced the painting of his house, and his painter had mixed the paints in the same room, and at the time of the fire, there was in it an oil barrel containing about a gallon of oil, a keg of white lead, and a pot with about a pint of mixed paint; that in another building described in the policy as used in part for a cider mill, the insured, before and after the execution of the policy, had been in the habit of repairing his farming utensils, and had also made in it a bee-hive, and planed some boards for a room in his house; but a day or two before the fire, the building had been cleared out, leaving nothing in it but some apples; it was held: 1. That the clause relating to the use of the building insured, was not a warranty that they should be used in that manner and in no other, but was inserted merely for the purpose of designating the buildings insured, and not to limit their use or deprive the insured of the enjoyment of his property in the same manner as buildings of that description are generally used and enjoyed. 2. That the acts of the insured, so far as they were or could have been the cause of the loss, were in accordance with the ordinary use of such buildings by farmers. Billings *v.* Tolland Co. Mutual Fire Ins. Co. 20 Conn. 139.

[1] N. Y. Equitable Ins. Co. *v.* Langdon, 6 Wend. 623, 627, *Sutherland*, J.: "The only question then is, whether the keeping of oil or spirituous liquors in the store, under the circumstances disclosed in the case, was appropriating or using the building for the purpose of storing those articles within the meaning of the policy. Every thing that was kept either in the store or cellar, was kept for the purpose of being retailed. The smaller vessels in the store were replenished from the larger ones in the cellar, which consisted, at the time of the fire, of one cask of oil, one barrel of rum, one cask of Jamaica spirits, and one pipe of gin; from all of which more or less had been drawn for the use of the store. It appears to me that the word storing was used by the parties in this case in the sense contended for by the plaintiff, viz.: a keeping for safe custody, to be delivered out in the same condition, substantially, as when received; and applies only where storing or safe-keeping is the sole or principal object of the deposit, and not where it is merely incidental, and the keeping is only for the purpose of consumption. If I send a cask of wine to a warehouse to be kept for me, that is a storing of it; but if I put it into my cellar or my garret to be drawn off and drank, I apprehend the term would not be considered as applying. Suppose all the varieties of wine were denominated hazardous by the various insurance companies, and the storing of them was prohibited in their policies; could it possibly apply to the private stock which a gentleman might keep in his own house, for his own use and consumption? It certainly would be perverting the term from its ordinary, and generally received acceptation." See 1 Hall, 226. It was held, in that case, that the word "storing" applies only where the storing or safe-keeping is the sole or principal object of the deposit, and not where it is merely incidental and the keeping is only for the purpose of consumption. This definition has been adopted by the courts. Thus, where oils and turpentine, which were classed among hazardous or extra-hazardous articles, were introduced for the purpose of repairing and painting the dwelling insured, and the dwelling was burned while being so repaired, the insurers were held liable. O'Niel *v.* Buffalo Fire Ins. Co. 3 Comst. 122; Lounsbury *v.* Protection Ins. Co. 8 Conn. 459. Where a policy of insurance contained a clause suspending the operation of the policy in case the premises should be appropriated, applied, or used to or for the purpose of storing or of keeping therein any of the articles described hazardous, one of the buildings insured being occupied by a card machine, it was held that the mere fact that a small quantity of undressed flax, (although a hazardous article,) had been permitted to remain in the basement of the carding-machine building, since the removal of the flax-dressing machinery from such basement a few days prior to the issuing of the policy, was not con-

appropriated to a more hazardous occupation than the proposals or the policy indicate, or if the jury find that the introduction

clusive evidence that the building was appropriated, applied, or used for storing or keeping flax within the meaning of those terms as used in the policy, and that leaving the small pile of undressed flax in the building, with no purpose of having it regularly stored or kept there, would not contravene the terms of the policy. *Parker*, J., dissented, being of opinion that the case came within the term "keeping," introduced into the policy. Hynds *v.* Schenectady Co. Mutual Ins. Co. 16 Barb. 119. The keeping of spirituous liquors in the building insured, for the purposes of consumption or sale by retail to boarders and others, is not a storing within the meaning of the policy. Rafferty *v.* New Brunswick Fire Ins. Co. 3 Harrison, 480. See Williams *v.* New England Fire Ins. Co. 31 Maine, 225; Allen *v.* Mutual Fire Ins. Co. 2 Maryland, 125; Billings *v.* Tolland Co. Mutual Fire Ins. Co. 20 Conn. 139; Duncan *v.* Sun Fire Ins. Co. 6 Wend. 488. In England, there is not complete harmony in the decisions. The earliest case is Dobson *v.* Sotheby, 1 Mood. & Malk. 90. The policy was effected on premises "wherein no fire is kept and no hazardous goods are deposited," and, provided that "if buildings of any description insured with the company, shall at any time after such insurance be made use of to store or warehouse any hazardous goods "without leave from the company, the policy should be forfeited." These words were held to mean the habitual use of fire or the ordinary deposit of hazardous goods, not their occasional introduction for a temporary purpose connected with the occupation of the premises, so that the policy was not vitiated by bringing a tar barrel and lighting a fire in order to effect repairs, in consequence of which the loss occurred. Where the premises insured were a granary and a "kiln for drying corn in use," and the policy was to be forfeited unless the buildings were accurately described and the trades carried on therein specified, it was held, although proved that a higher premium was exacted for a bark kiln than a malt kiln, and that the latter was more dangerous, and the loss happened from the use of the kiln in drying the bark, that a temporary and gratuitous permission to a friend to dry bark in the kiln, did not avoid the policy. Shaw *v.* Robberds, 6 A. & E. 75; see Barrett *v.* Jermy, 3 Exch. 535. The authority of these cases has been diminished by a recent decision of the Court of Exchequer, under a condition providing that, in case any steam-engine, stove, &c., or any other description of fire-heat be introduced, notice thereof must be given, and every such alteration must be allowed by indorsement, and any further premium which the alteration may occasion, must be paid, otherwise no benefit will arise to the assured in case of loss. The assured, who was a cabinet-maker, placed a small engine on the premises with a boiler attached, and used it in a heated state for the purpose of turning a lathe, not in the course of his business, but for the purpose of ascertaining by experiment whether it was worth his while to buy it to be used in that business; and after the engine had been on the premises for several days, a fire happened. It was held that the policy was avoided, and that whether the engine was introduced for experiment as an approved means of carrying on the plaintiff's business; whether used for a longer or shorter time, or whether the fire was occasioned by the working of the steam-engine or not, were immaterial questions. Glen *v.* Lewis, 8 Exch. 607. See 20 Eng. L. & Eq. 364, *Parke*, B.: "Now the clause in question implies, that the simple introduction of a steam-engine, without having fire applied to it, will not affect the policy; but if used with fire heat, it will; and nothing being said about the intention of the parties as to the particular use of it, and as, if it be used, the danger is precisely the same, with whatever object it is used, it seems to us that it makes no difference whether it is used upon trial with the intent of ascertaining whether it will succeed or not, or as an approved means of carrying on the plaintiff's business, nor does it make any difference that it is used for a longer or a shorter time. The terms of the conditions apply to the introduction of a steam-engine in a heated state at any time, without notice to the company, so as to afford an opportunity to them to ascertain whether it will increase the risk or not. The clause proceeds to provide that every such alteration must be allowed by indorsement on the policy, and the premium paid, and if not, no benefit will arise to the insured in case of loss. The expression 'alteration' is inaccurate; but it obviously means to embrace all the circumstances before mentioned, though all are not, properly speaking, alterations. This appears to be the natural and ordinary construction of this part of the contract, and it is far from unreasonable. In such cases, which are unquestionably likely to increase the risk, the company stipulate for notice in clear terms, in order that

of these goods materially increased the actual risk, evidence would be received as to the intention of the parties to the contract. And the true meaning of the contract and the intent of the parties would be considered. Thus, where the "storing" of certain goods was prohibited, as "hazardous" — it was held that the having a pipe or two of such articles in the cellar, from which smaller vessels in the store were replenished, did not come within the meaning of the word "storing" in the policy, any more than would the keeping of such articles for home consumption, in a dwelling-house insured by a similar policy.[1] So a description of a house as "at present occupied as a dwelling-house, but to be hereafter occupied as a tavern, and privileged as such," is only permission that it should be a tavern, and creates no obligation to occupy and keep it as a tavern on the part of the insured. But if the language is, "to be occupied as so or so, but *not*" in

they may consider whether they will continue their liability, and on what terms. There is not a word to confine the introduction of the steam-engine to its intended use as an instrument or auxiliary in carrying on the business in the premises insured. If a construction had already been put on the clause precisely similar in any decided case, we should defer to that authority. But, in truth, there is none. All the cases upon this subject depend upon the construction of different instruments, and there is none precisely like this. Indeed, it seems not improbable that the terms of this policy have been adopted, as suggested by Sir F. *Thesiger*, to prevent the effect of previous decisions; the provision 'that no description of fire-heat shall be introduced' in consequence of the ruling of Lord *Tenterdon*, in Dobson *v.* Sotheby, 1 Moo. & M. 90; and the addition of 'process or operation' to trade or business, to prevent the application of that of Shaw *v.* Robberds, 6 Ad. & El. 75. The latter case is the only one which approaches the present. One cannot help feeling that the construction of the policy in that case may have been somewhat influenced by the apparent hardship of avoiding it, by reason of the accidental and charitable use of the kiln, the subject of the insurance. The court considered the conditions in that case to refer to alterations, either in the building or the business, and to those only. Here the introduction of steam-engines, or any other description of fire-heat, is specifically pointed at, and expressly provided for. If, in that case, the condition had been (*inter alia*,) that no bark should be dried in the kiln, without notice to the company, which would have resembled this case, we are far from thinking that the court could have held that the drying which took place did not avoid the policy, by reason of being an extraordinary occurrence and a charity. We are, therefore, of opinion that the defendant is entitled to our judgment, and that the material part of the second plea is proved." See Sillem *v.* Thornton, 26 Eng. L. & Eq. 244. Where there was a warranty that a mill should be "worked by day only," it was held not broken by the working of part of the mill by night. Mayall *v.* Mitford, 6 Ad. & El. 670; Whitehead *v.* Price, 2 C. M. & R. 447.

[1] Catlin *v.* Springfield Fire Ins. Co. 1 Sumner, 434, 440. Where the premises were described in the application and policy as occupied by A B as a private dwelling, this was held not to be a warranty of the continuation of the occupation during the risk, and the insurers were liable, although the loss happened after the occupant had left the premises vacant. O'Niel *v.* Buffalo Fire Ins. Co. 3 Comst. 122; Rafferty *v.* New Brunswick Fire Ins. Co. 3 Harrison, 480. In this case it was held that it is not a violation of a policy of insurance that a house insured as a dwelling-house, was afterwards occupied as a boarding-house, if boarding-houses are not in the list of prohibited occupations. A change of tenants, the policy being silent on the subject, does not invalidate it, though the first tenant may be a prudent, and the second a grossly careless man. Gates *v.* Madison Co. Mutual Ins. Co. 1 Selden, 469.

some other certain way, this restriction is a part of the bargain; and if they are so occupied, the insurers are discharged. So if the premises are described as "a private residence," the insurance is not avoided by the fact that the occupants moved out of the house, leaving it vacant, and not the "residence" of any one, unless the jury find that the risk was thereby materially increased.[1] But where the property was represented as a "tavern barn," and the insured permitted its occupation as a livery stable, an expert was permitted to testify that a livery-stable was materially more hazardous than a tavern barn. And, on this ground, the policy was held to be discharged, although the keeper of the livery-stable was removable at the pleasure of the insured.[2]

The general subject of alterations of property under insurance against fire, is not without difficulty. On the whole, however, we are satisfied that mere alterations, although expensive and important, do not necessarily and *per se* avoid the insurance or discharge the insurers. But that they have this effect, if they are found by the jury to increase the risk materially; or if they are specifically prohibited in the policy, for this amounts, in the one case, to an agreement by the parties that they shall be considered as increasing the risk, and in the other, as a promise by the insured that they shall not be made.[3]

Still other questions may arise where material alterations are made, all of which are not easily disposed of. The following are instances. Suppose one gets his dwelling-house insured for seven years, truly describing it as having a shingled roof. After two or three years he determines to take off the shingles, but says nothing to the insurers about it. If he now puts on slates, or a metallic covering which does not require soldering, he does not increase the risk, nor is the work of putting on the new covering

[1] Hobby *v.* Dana, 17 Barb. S. C. Rep. 111.

[2] Where a building insured by a company was represented at the time of effecting the insurance, as connected with another building on one side only, and before the loss happened it became connected on two sides, the policy was held not to be avoided unless the risk thereby became greater. Stetson *v.* Mass. Mutual Fire Ins. Co. 4 Mass. 330; per *Sewall*, J., 337–339. And whether such alterations increased the risk, is a question for the jury. Curry *v.* Commonwealth Ins. Co. 10 Pick. 535. The following cases sustain the doctrine that an alteration which increases the risk avoids the policy. Jones' Manufacturing Co. *v.* Manufacturers' Mutual Fire Ins. Co. 8 Cush. 82; Perry Co. Ins. Co. *v.* Stuart, 19 Penn. State, 45; Jefferson Co. Ins. Co. *v.* Cotheal, 7 Wend. 72; Grant *v.* Howard Ins. Co. 5 Hill, 10; Allen *v.* Mutual Fire Ins. Co. 2 Maryland, 125, 128. See Sillem *v.* Thornton, 26 Eng. L. & Eq. 238.

[3] Young *v.* Washington Co. Mut. Ins. Co. 14 Barb. S. C. 545.

hazardous, and we see no grounds for its having any effect on the policy. But suppose the new metallic covering is secured by soldering. This is certainly a hazardous operation. And if the building takes fire in consequence of this operation, the insurers are certainly discharged. If the operation is conducted safely through, and the work is entirely finished, we consider it clear that this greater hazard for a time has no effect whatever on the policy after that time, and after all the greater hazard has expired. But let us suppose that while this operation is going forward, and the house is thereby certainly exposed to an increase of risk, the house is set on fire by an incendiary — without the slightest reference to this alteration — and burns down. It is not, perhaps, settled either by authority or practice, whether the insurers be or be not discharged. We are, however, of opinion that the principles of insurance would lead to the conclusion that, if the house be burned from a perfectly independent cause, during an increase of risk incurred in good faith, the insurers are not thereby discharged. It is however certain that it is always prudent to obtain the consent of the insurers to any proposed alteration. If such consent be asked, and refused, we do not see that the insurers stand on any better footing, or the insured on any worse one; and if the alterations are made and a loss occurs, we should say that the insurers would not, generally at least, be discharged, unless they would have been, had the alteration been made without their knowledge. For if they have a right to object or refuse, it could only be because the contract in effect prohibited this alteration; and then their refusal was not wanted for their defence. And if they have no right to refuse, they can acquire no rights by the refusal.

If the alteration be of a permanent character, and causes a material increase of the danger of fire, then it is a substantial breach of contract; and we should hold that the insurers were discharged as soon as the alteration was made, and indeed as soon as the making of it, or preparations for it, as scaffolding or carpenter's work, materially increased the risk. And they are discharged equally, whether the fire be caused by the alteration, or by the work done, or by some wholly independent matter.

But where an application for insurance upon a dwelling-house described a store owned by the applicant, situated near the house,

and the policy contained no prohibition against the rebuilding of the store, and when it was burned the owner rebuilt the same, and in doing so a fire occurred in the store which communicated to and destroyed the house, but there was no negligence on the part of the insured, the insurers were held, because the insured had the right of rebuilding the store, using proper precautions.[1]

We apprehend further, that the insured retains his right to keep his buildings in good repair; and indeed, it is rather his duty, or at least for the interest of the insurers, that he should do so. For any condition of disrepair, would tend, more or less strongly, to increase the risk of fire, if only by causing a general neglect or lowering the class of occupants. The insured, therefore, may repair without especial leave, and the insurers are liable although the fire take place while the repairs are going on; and even if it be caused by the repairs; and so they would be if this cause might seem to come within the express prohibition of the policy, if it were introduced merely for repair, and the prohibition should be construed as intended to prevent a general employment of the buildings in a hazardous way. Thus, a condition avoiding the policy "if the buildings at any time after the insurance be made use of to store or warehouse any hazardous goods," did not discharge the insurers of a barn burned from the boiling over of a tar-barrel brought within it for the purpose of repair.[2] It may be added that our fire policies now in use frequently give the insured the right of keeping the property in repair.

In England, fire policies are often made with a right of renewal, and many questions have risen there under this right.[3] We are not aware of any such cases or any such practice in this country. But it is generally understood, and sometimes agreed, that if a fire policy be renewed, there shall be no charge for the new policy.

[1] Young *v.* Washington Co. Mut. Ins. Co. 14 Barb. S. C. 545.

[2] Dobson *v.* Sotheby, 1 Mood. & Malk. 90. Where a fire policy was conditioned to become void if the building insured should be used for the purpose of carrying on or exercising any trade, business, or vocation denominated hazardous or extra-hazardous, or specified in the memorandum of special rates, and the memorandum referred to mentioned among other things, "houses, building or repairing," it was held that these words, taken in connection with the policy, must be understood in reference to carrying on the trade of house-building, or house-repairing, in or about the building insured, and that they did not apply to repairs made upon the building itself. Grant *v.* Howard Ins. Co. 5 Hill, 10; O'Niel *v.* Buffalo Ins. Co. 3 Comst. 122; Jolly *v.* Baltimore Equitable Society, 1 Har. & Gill, 295; Allen *v.* Mutual Fire Insurance Co. 2 Maryland, 125–128; Lounsbury Protection Ins. Co. 8 Conn. 459; Billings *v.* Tolland, 20 id. 139.

[3] 1 Beaumont on Insurance, ch. 3.

And it has been held, where the policy was under seal, and was renewed several times by indorsement, that the renewals were equivalent only to new orders for insurance assented to, and did not constitute new policies.[1]

SECTION III.

OF THE INTEREST OF THE INSURED.

As to what interest in the insured is sufficient to support an insurance, the principle is the same in fire as in marine insurance. Any legal interest is sufficient. And if it be equitable in the sense that a Court of Equity will recognize and protect it, that is sufficient;[2] but a merely moral, or expectant interest is not enough.[3] Hence, one who has made only an oral bargain with

[1] Luciani *v.* American Fire Ins. Co. 2 Whart. 167.

[2] Tyler *v.* Ætna Fire Ins. Co. 12 Wend. 507; S. C. 16 id. 385; Swift *v.* Vt. Mutual Fire Ins. Co. 18 Vt. 305. A purchaser of a house and lot in possession under a written contract, who has made a partial payment and repaired the premises, has an insurable interest. McGivney *v.* Phœnix Fire Ins. Co. 1 Wend. 85. Where a moiety of a building insured by a company, was conveyed in fee, the grantor reserving a term of seven years therein, and the grantee immediately reconveyed the same to the grantor on mortgage, and the mortgagee demised them to the mortgagor and another for seven years, reserving rent, it was held that the company was liable in case of loss, notwithstanding such conveyances. Stetson *v.* Mass. Mutual Fire Ins. Co. 4 Mass. 330; see Morrison *v.* Tennessee Marine & Fire Ins. Co. 18 Missouri, 262. Where a party holds the legal title, and the equitable title is in another, he has an insurable interest. Thus, where one has made an agreement for the sale of his real estate insured, but has not made a conveyance nor received the purchase-money, his interest in the property and policy is not thereby parted with so as to bar his right of action on the happening of a loss. Perry Co. Ins. Co. *v.* Stewart, 19 Penn. State, 45. A vendor of real estate, after articles of agreement and before conveyance, may insure the full value of the buildings, and where the policy is in form an insurance on the buildings, it is *primâ facie* an insurance on the whole legal and equitable estate, and not upon the balance of the purchase-money unpaid. Insurance Co. *v.* Updegraff, 21 Penn. State, 513. Personal property, after being insured against fire, was sold by the insurer, and but part of the purchase-money being paid, it was agreed between the vendor and vendee that the vendor was to retain possession of the property and of the policies of insurance, till he was paid in full. The property was destroyed by fire before payment in full, and on an attachment and execution against the vendor by a creditor, the claims against the insurance company were attached; it was held that such a possession was good as between parties to the sale; in favor of creditors of the vendor, the goods might be treated as his; as against the insurance companies the vendor was to be considered the owner to the extent of the unpaid purchase-money. That, notwithstanding his sale, the vendor still possessed an insurable interest, and he or his creditor was entitled to recover the amount payable under the policies of insurance. Norcross *v.* Insurance Companies, 17 Penn. State, 429.

[3] Lucena *v.* Craufurd, 2 B. & P. N. R. 324, per Lord *Eldon*. One has no insurable interest in a house erected on land of another without license or shadow of title. Sweeny *v.* Franklin Fire Ins. Co. 20 Penn. State, 337. "But he has an insurable interest if his house was placed on another's land with the owner's consent." Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 419. A party has no insurable interest on goods for

another to purchase his house, cannot insure it; but if there be a valid contract in law, or if by writing, or by part performance, it is enforcible in equity,[1] the purchaser may insure. So he may although there be a stipulation, the breach of which has made the contract void by its terms, if the other party might waive the condition and enforce the contract.[2] So, if a debtor assign his property to pay his debts, he has an insurable interest in it until the debts are paid, or until the property be sold. This was so held where it appeared that the property would pay the debts and leave a surplus for the assignor; but we should expect the same ruling where this was not the case, although in this instance there had been previously a verdict for the plaintiff and a new trial for want of evidence of such surplus.[3]

A mortgagor may insure the whole value of his property, even after the possession has passed to the mortgagee, if the equity of redemption be not wholly gone.[4] So he may if his equity of

which he has made an oral contract, where the sales of such goods is within the Statute of Frauds. Stockdale *v.* Dunlop, 6 M. & Wels. 224. It is held in Ohio that a stockholder in an incorporated company has no insurable interest in its property. Phillips *v.* Knox Co. Mutual Ins. Co. 20 Ohio, 174.

[1] See *ante*, p. 507, n. 2.

[2] Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25, *Marshall*, C. J.: "That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law, is his. If the purchase-money be paid, it is his in fact. If he owes the purchase-money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss. We perceive no reason why he should not be permitted to insure against it. The cases cited in argument, and those summed up in Phillips on Insurance, 26, on insurable interest, and 1 Marshall, 104, c. 4, and 2 Marshall, 787, c. 11, prove, we think, that any actual interest, legal or equitable, is insurable." S. C. 10 id. 507.

[3] Lazarus *v.* Commonwealth Ins. Co. 19 Pick. 81; S. C. 5 id. 76. A person discharged by the Insolvent Debtors' Court as an insolvent debtor, effected an insurance on some property acquired by him before the insolvency. The property having been destroyed by fire, the order for his discharge was afterwards annulled on the ground of fraud, and he was adjudged to imprisonment. In a suit on the policy, he was held to have an insurable interest. Marks *v.* Hamilton, 9 Eng. Law & Eq. 503; S. C. 7 Exch. 323, *Alderson*, B.: "The insolvent, having the possession of the property, is responsible for it to the assignees; then why may he not insure it." *Pollock*, C. B.: "We are all clearly of opinion that as he was in possession as the apparent owner, responsible to those who were the real owners, he had, under those circumstances, an insurable interest." See Dadmun Manuf. Co. *v.* Worcester Mut. Fire Ins. Co. 11 Met. 429.

[4] Columbian Ins. Co. *v.* Lawrence, 2 Pets. 25; Traders' Ins. Co. *v.* Robert, 9 Wend. 404; S. C. 17 id. 631; Tillou *v.* Kingston Fire Ins. Co. 7 Barb. 570; Stetson *v.* Mass. Mutual Fire Ins. Co. 4 Mass. 330; Locke *v.* North American Ins. Co. 13 id. 66, 67. A mortgagee may insure the property to secure his claim. Wheeling Ins. Co. *v.* Morrison, 11 Leigh. 362, 363; King *v.* State Mutual Fire Ins. Co. 7 Cush. 1; Allen *v.* Mut. Fire Ins. Co. 2 Maryland, 111.

redemption is seized on execution, or even sold, so long as he may still redeem.[1] And in case of loss he recovers the whole value of the building if he be insured to that amount.[2]

A mortgagor and a mortgagee may both insure the same property, and neither need specify his interest, but simply call it his property. The mortgagee has an interest only equal to his debt, and founded upon it; and if the debt be paid, the interest ceases, and the policy is discharged; and he can recover no more than the amount of his debt.[3] And if a house, insured by a mortgagee, were damaged by fire, even considerably, or perhaps destroyed, it might be doubted, on what we should think good grounds, whether he could recover, if it were proved that the remaining value of the premises mortgaged, was certainly more than sufficient to secure his debts, and all reasonably possible interest, cost, and charges.[4] Whether he can hold what he thus receives from the insurers, and also recover his debt from the debtor, we have considered in the chapter on Marine Insurance. We will only say, that while recent decisions have thrown much doubt upon this question, we are still of opinion that he cannot hold both; and that the insurers should generally be, in some way, subrogated to his rights against the debtor, for the amount which they pay to him. The question might possibly arise,

[1] Strong *v.* Manufacturers' Ins. Co. 10 Pick. 40; Miltenberger *v.* Beacom, 9 Barr. 199.

[2] Jackson *v.* Mass. Mutual Fire Ins. Co. 23 Pick. 422; Traders' Ins. Co. *v.* Robert, 9 Wend. 404; S. C. 17 id. 631.

[3] Motley *v.* Manuf. Ins. Co. 29 Maine, 337; Carpenter *v.* Providence Washington Ins. Co. 16 Peters, 495; Wilson *v.* Hill, 3 Met. 66; Macomber *v.* Cambridge Mutual Fire Ins. Co. 8 Cushing, 133.

[4] Smith *v.* Ins. Co. 17 Penn. State, 260. Per *Gibson*, J.: "The interest of a mortgagee is a special, but an insurable one, and it may, at his option, be insured generally or specially;—generally, when he says nothing about his mortgage, and insures as the entire owner; and specially, when the nature of his interest is specified in a memorandum. By the first, he pays a premium proportional to the risk of the absolute ownership; by the second, a premium proportional to the risk of a less and derivative ownership. In the one case, and in the other, the subject of the insurance is the *corpus* of the thing insured, but actually the interest of the party assured in it. If the absolute owner be insured, he recovers the full value of the thing lost, because his interest in it is commensurate with its value; if the owner of a limited interest in it is insured, he recovers only to the extent of his interest. Each may insure separately, and recover separately, *pro interesse sui*. A policy of insurance has been, from the beginning, a rude and indigested instrument, whose legal effect, moulded by usage and judicial decision, is different from a strict interpretation of it. As the words of an execution are frequently controlled with us by an indorsement, so are the words of a policy frequently controlled by a memorandum. Notwithstanding the form of the contract, therefore, a mortgagee insures, whether generally or specially, not the ultimate safety of the whole of the property, but only so much of it as may be enough to satisfy his mortgage. It is not the specific property that is insured, but its capacity to pay the mortgage debt. In effect, the security is insured."

whether the debtor could compel or require him to enforce his claims against the insurers, and then consider the debt paid thereby, for his benefit; but we should hold, very confidently, that he could not.[1]

It has been held, for strong reasons, that if a mortgagor is bound by his contract with the mortgagee to keep the premises insured for the benefit of the mortgagee, and does keep them insured, the mortgagee has an equitable interest in or lien upon the proceeds of the policy.[2]

[1] It was held in White *v.* Brown, 2 Cushing, 412, that if a mortgagee in possession for condition broken, insure his interest in the premises without any agreement therefor between him and the mortgagor, and a loss accrues, which is paid to the mortgagee, the mortgagor, on a bill to redeem and an account stated for the purpose, is not entitled to have the amount of such loss deducted from the mortgagee's charges for repairs. There was no privity in law or fact between the mortgagor and mortgagee in the contract of insurance, and if the mortgagee gets his interest insured, and receives the amount of the insurance under his policy, it does not affect his claim against the mortgagor. The two claims are wholly distinct and independent. Cushing *v.* Thompson, 34 Maine, 496. In King *v.* State Mutual Fire Ins. Co. 7 Cushing, 1, it was held, that a mortgagee, who, at his own expense, insures his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest, is entitled, in case of loss by fire before payment of the mortgage debt, to recover the amount of the loss from the insurers to his own use, without first assigning his mortgage, or any part thereof, to them. In an elaborate opinion, the court maintain that, notwithstanding respectable authorities to the contrary, when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as part of the mortgage debt; it is not a payment, in whole or in part; but he has still a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer, who has thus paid the loss, or money paid to his use. The court, in a note, cite the case of Dobson *v.* Land, 8 Hare, 216, reviewed in 13 Law Reporter, 247: "The question there was upon the branch of the proposition, whether a mortgagee in possession, on stating his account under a bill to redeem, had a right to charge premiums of insurances obtained by himself on buildings constituting part of the mortgaged property, and add the same to the principal and interest of his debt, and it was decided that he could not. It was conceded that this involved the correlative proposition, that if the mortgagee had received any sum by way of loss on such policies, he would be under no obligation in equity to credit it to the mortgagor, or be responsible to him for it." See Morrison *v.* Tennessee Marine & Fire Ins. Co. 18 Missouri, 262. In Pennsylvania, it is held that, where the mortgagee insures the debt, the underwriter having paid the mortgage debt, is entitled to have recourse to the mortgaged property, and to a cession of the security. Smith *v.* Columbia Ins. Co. 17 Penn. State, 253; Insurance Co. *v.* Updegraff, 21 id. 513. The right of the insurers to subrogation, where they pay the debt, is sustained in Ætna Ins. Co. *v.* Tyler, 16 Wend. 385, 397. Per *Walworth*, Chancellor. See Carpenter *v.* Providence Washington Ins. Co. 16 Peters, 495, 501. It seems to have been allowed by the old French law, and its justice has been approved in England in a case which was appealed from the Court of Queen's Bench for the district of Montreal, to her Majesty in council. Quebec Fire Ins. Co. *v.* St Louis, 22 Eng. Law & Eq. 73; S. C. 7 Moore, Privy Council Cases, 286. Where buildings were destroyed by gunpowder, under an order of the city authorities, to stop the ravages of a fire, the insurers were allowed to deduct from the sum insured, the amount received by the insured, from the city. Pentz *v.* Receivers of Ætna Fire Ins. Co. 3 Edw. Ch. 341; S. C. 9 Paige, 568.

[2] Thomas *v.* Vonkapff, 6 G. & Johns. 372; Vernon *v.* Smith, 5 B. & Ald. 1. But where there is no such obligation on the part of the mortgagor to insure for the benefit

A tenant, by the courtesy, may insure the property, even if his wife be only a joint-tenant.[1] One who holds by *disseisin*, if he has a freehold interest, and the exclusive right of occupation, may insure the building, and as his own property, although he is liable to be ousted by another who has a right of action.[2] And a tenant for years, or from year to year, may insure his interest, but would recover only the value of his interest, and not the value of the whole property.[3]

We have said that, generally, any one having any legal interest in property, may insure it as his own. But there is one important exception to, or modification of this rule. By the charters of many of our mutual insurance companies, the company has a lien, to the amount of the premium note, on all property insured. It is obvious, therefore, that no such description can be given, or no such language used, as would induce the company to suppose they had a lien when they could not have one, or would in any way deceive them as to the validity or value of their lien. In all such cases, all incumbrances must be stated, and the title or interest of the insured fully stated, in all those particulars in which it affects the lien.[4]

of the mortgagee, the mortgagee has no such equitable lien upon the policy. Carter *v.* Rockett, 8 Paige, 437. Chancellor *Walworth*: "A contract of insurance against fire, as a general rule, is a mere personal contract between the assured and the underwriter, to indemnify the former against any loss he may sustain. But the assured, by an agreement to insure for the protection and indemnity of another person, having an interest in the subject of the insurance, may unquestionably give such third person an equitable lien upon the money due upon the policy, to the extent of such interest. . . . But a mere lien upon the property insured does not give the holder of that lien a corresponding claim upon the policy which the owner of the goods has obtained for the protection of his own interest therein; although the assured is personally liable to pay the debt, which is a lien upon the property insured." Columbia Ins. Co. *v.* Lawrence, 10 Peters, 507, 512; McDonald *v.* Black, 20 Ohio, 193. It seems that an order indorsed by the assured, on a policy issued by a mutual insurance company, "to pay the within in case of loss" to a mortgagee, and assented to by the company, will enable the mortgagee to sue on the policy in his own name. Barrett *v.* Union Mutual Fire Ins. Co. 7 Cush. 175. Where the policy provides that the insurance, in case of loss, shall be paid to a third person, the action should be in the name of the party to the policy. Nevins *v.* Rockingham Fire Ins. Co. 5 Foster, 22.

[1] Franklin Ins. Co. *v.* Drake, 2 B. Monr. 47.

[2] Curry *v.* Commonwealth Ins. Co. 10 Pick. 535.

[3] Niblo *v.* North American Fire Ins. Co. 1 Sandf. 551. But where the tenant owns the building and not the land under it, with the right of removing the building, he may recover the value of the building, if insured to that extent. Laurent *v.* Chatham Ins. Co. 1 Hall, 41. See Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 419.

[4] Where a mutual fire insurance company were entitled to a lien on all property insured by them, and one condition of the insurance was, that if the representation made by the applicant was false, the policy should not cover the loss; and the insured, in his application, stated that he was the owner of the building insured, whereas he had only a bond for a deed of it, upon the performance of certain conditions, which he never

A trustee, agent, or consignee, may insure against fire, as he may against marine loss.[1] Generally, the consignee is not bound to insure against fire, but may, at his discretion.[2] If the insurance is expressly on goods held on commission, the insurers must take notice that the owner does not retain possession of them, and that they are to be in the custody, and under the vigilance, integrity, and care of the consignor only.[3] He may insure, expressly, his own interest in them for advances, or the owner's interest. It has been held, in a recent case, and, as we think, on excellent reasons, that a consignee may, by virtue of his implied interest and authority, insure, in his own name, goods in his possession *against fire*, to their full value, and recover for the benefit of the owner.[4] And if the interest be not expressed, the policy will be construed as not covering the interest of the owners, if, upon a fair construction of the words and facts, it seems to have been the intention of the parties only to secure the consignee's interest.[5]

performed, it was held that no recovery could be had on the policy. Brown *v.* Williams, 28 Maine, 252; Smith *v.* Bowditch Mutual Fire Ins. Co. 6 Cushing, 448; Lowell *v.* Middlesex Mutual Fire Ins. Co. 8 id. 127. So where the building insured was on land held under a lease. Mutual Assurance Co. *v.* Mahon, 5 Call, (Va.) 517. The policy is void where stockholders of a corporation insure its property as their own in fee-simple. Phillips *v.* Knox Co. Mutual Ins. Co. 20 Ohio, 174. So previous mortgages on the property insured must be made known. Addison *v.* Ky. & Louisville Ins. Co. 7 B. Monr. 470; Smith *v.* Columbia Ins. Co. 17 Penn. State, 253; Warner *v.* Middlesex Mut. Ass. Co. 21 Conn. 444. Where the application, which is made a part of the policy, declares that, if the assured should suffer a judgment, which should be a lien on the insured premises, without communicating it to the insurers, the policy should be void, held that this warranty having been broken, the policy was void. Egan *v.* Mutual Ins. Co. 5 Denio, 326. It has been held, that the applicant is bound to communicate the existence of prior incumbrances, without inquiry by the insurers. Smith *v.* Columbia Ins. Co. 17 Penn. State, 253. But see Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 419; Masters *v.* Madison Co. Mutual Ins. Co. 11 Barb. 631.

[1] Lucena *v.* Craufurd, 3 B. & P. 95; De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 103.

[2] Story on Agency, § 3. De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 119–121.

[3] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 128.

[4] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 84, 116; Siter *v.* Morrs, 13 Penn. State, 220; Goodall *v.* New England Mutual Fire Insurance Co. 5 Foster, 169, 186.

[5] Parks *v.* Gen. Interest Assurance Co. 5 Pick. 34. An insurance upon merchandise in a warehouse, "for account of whom it may concern," protects only such interests as were intended to be insured at the time of effecting the insurance. Steele *v.* Insurance Co. 17 Penn. State, 290, 298. *Lewis*, J.: "All the authorities go to show, that the intention of the party effecting an insurance, at the time of doing so, ought to lead and govern the future use of it, and that no one can, by any subsequent act, entitle himself to the benefit of it, without showing that his interest was intended to be embraced by it when it was made. This rule has especial application to insurances made 'for account of whom it may concern;' and where these terms are used in the policy, it is not sufficient for the party who claims the benefit of the insurance, to show merely that he is the owner of, or has an insurable interest in the goods. He must show that he caused the insurance to be effected for his benefit, or that it was intended, at the time, for his security. These terms in the policy will not, in general, dispense with this evidence. And where the party claiming the benefit, cannot show that he

It is now common for a commission merchant to cover, in one policy, in his own name, all the goods of the various owners who have consigned to him.[1] It has been held, that "goods held on commission" in fire policies, have an effect equivalent to "for whom it may concern," in marine policies.[2] And it was also intimated, but, as we think, on doubtful grounds, that if the goods actually were held on commission, they would not be covered by the policy, unless so described, although the insured had a lien for advances; in this case, however, the condition in the policy excluded such goods.[3]

A consignee of goods, sent to him, but not received, may insure his own interest in them against marine risks, and we know no reason why he may not against fire.[4]

So, any bailee, who has a legal interest in the chattels which he holds, although this be temporary and qualified, may insure the goods against fire. Thus, it has been held, that a common carrier by land, who has a lien on the goods, and is answerable for them if lost by fire, (unless by the act of God or the public enemy), may insure the goods to their full value, against fire.[5]

The insurers must know whom they insure; for they may have a choice of persons, and it is important to them to know whether they are to depend on the care and honesty of this man or of that man. The insured must so describe the owner, as not to deceive them on this point, and so he must the ownership. Thus, if he aver an entire interest in himself, he cannot support this by

caused or directed the insurance to be effected, it will not serve him to rest upon some supposed secret intention not manifested by a single word or act, at the time of the transaction, to mark its character and indicate the person or interest intended to be insured. That which is not manifested by evidence, is to be treated as having no existence. The nature of the transaction must be fixed at the time of insurance, and cannot be changed by subsequent consent of the insured, without the authority of the underwriters. If this were not law, all the mischiefs arising from gambling policies might ensue."

[1] Millaudon *v.* Atlantic Ins. Co. 8 Louis. 557.

[2] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 124, 125.

[3] A policy was effected by the plaintiff "on goods and furniture contained in his counting-room." One of the conditions of the policy provided that "goods held in trust or on commission" should not be covered unless they are insured as such, and the articles in question were held in trust and commission. The policy was accordingly held void. Brichta *v.* N. Y. Lafayette Ins. Co. 2 Hall, 372.

[4] Putnam *v.* Mercantile Ins. Co. 5 Met. 386.

[5] In Crowley *v.* Cohen, 3 B. & Ad. 478, it was held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge, and that their particular interest need not be specified. Van Natta *v.* Mutual Security Ins. Co. 2 Sandf. 490; Chase *v.* Washington Mutual Ins. Co. 12 Barb. 595.

showing a joint interest with another; and if he aver the latter, proof of the former is not sufficient.[1]

So too, there must be actual authority to make the insurance. This may be express or implied, in some cases, as it seems to be with the consignee, or the carrier, and perhaps, generally, with any one who has an actual possession of, interest in, and lien on the property. But a tenant, in common, does not derive from his cotenancy authority to insure for his cotenant; nor could a master of a ship or a ship's-husband, merely as such, insure the owner's interest against fire, any more than against marine loss.[2]

SECTION IV.

OF REINSURANCE.

Reinsurance is equally lawful in fire policies as in marine policies, and in general is governed by the same rules. The reinsurance is an insurance not of the risk of the insured, for that is a merely ideal thing; but it is an insurance of the property originally insured, in which the first insurers have an insurable interest. If a common policy be used, with no other change than that the word reinsurance is used instead of insurance, all its requirements are in force. If, for example, in case of loss, this policy requires a certificate from a magistrate as to character, circumstances, &c., that must be furnished by the reinsured. But if a suitable certificate were given by the party first insured to the original insurer, and he transmit the same forthwith to those who insure him, that is enough; and so it would be with notice, preliminary proof, and all similar requirements.[3] And an insurer who obtains

[1] Catlett *v.* Pacific Ins. Co. 1 Paine, C. C. 615. Where the act incorporating the company provided that the policy may be void where the true title of the assured is not expressed, and the plaintiff, in his written application, described himself as "the owner of the buildings," whereas he was tenant by the courtesy, it was held that he could not recover on the policy. Leathers *v.* Farmers' Mutual Fire Ins. Co. 4 Foster, 259. Where the policy is effected "on account of the owners," it is competent to show by parol evidence, who were intended by that designation. Catlett *v.* Pacific Ins. Co. 1 Wend. 561; Foster *v.* U. S. Ins. Co. 11 Pick. 85.

[2] Alliance Marine Ins. Co. *v.* La. State Ins. Co. 8 Louis. 1. A previous authority to insure is not necessary. But a subsequent adoption, even after a loss, is sufficient, provided the party effecting the insurance intended at the time to have the interest of the ratifying party embraced in the policy. Durand *v.* Thouron, 1 Port. (Ala.) 238; Watkins *v.* Durand, id. 251; De Bolle *v.* Pennsylvania Ins. Co. 4 Whart. 68; Miltenberger *v.* Beacom, 9 Barr. 198.

[3] Foster *v.* U. S. Insurance Co. 11 Pick. 85.

reinsurance, is bound to communicate, (in addition to whatever else should be stated by one asking insurance), all the information he has concerning the character of the party originally insured; and a material concealment on this point would avoid the policy.[1]

As the insurer, who is reinsured, effects an insurance not on his risk, but on the property, it seems to be very strongly held, that he recovers in case of loss, not merely what he actually pays — although this might be an adequate indemnity — but all that he was legally liable to pay. Of course if he has any valid defence, he must make it; and if it discharges him, it destroys his claim on his insurers. But if there be a loss which he is bound to pay, he recovers from his insurers the whole amount of it, whether he actually pays or not.[2]

A question then arises, whether if an insurer who is reinsured becomes insolvent, so that the originally insured does not get a payment upon his policy, he has not a lien upon, or a specific interest in the policy of reinsurance. But it is held that he has not. The reinsurers, assignees, or trustees, take all that is payable under the policy of reinsurance, and hold it as assets for the creditors generally of the reinsured; and the originally insured takes only his proper share or dividend as one of the creditors.[3]

Where a reinsurer claimed, under the usage of the city of New York, to pay only the same proportion of the entire loss of the original assured, which the sum reinsured bore to that of the original insurance, the court held that the usage could not be permitted to control the rules of law. The original insurance was for $22,000. The reinsurance was for $10,000. The loss was $14,373.36. The amount payable by the usage (which was clearly proved) was $6,685.25. A verdict was taken for $10,962.11, subject to the opinion of the court, and was sustained. There was a clause in the policy, by which reinsurance was effected, in these words: "In case of any other insurance upon the property hereby insured, prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to recover on this policy any greater proportion of the loss or damage, than the amount hereby insured shall bear to the whole

[1] N. Y. Bowery Fire Ins. Co. *v.* N. Y. Fire Ins. Co. 17 Wend. 359.
[2] Hone *v.* Mutual Safety Ins. Co. 1 Sandf. 153.
[3] Herckenrath *v.* American Mutual Ins. Co. 3 Barb. Ch. 63.

amount insured on the same property." And it was held to apply only to cases of *double* insurance, for which it was intended. And therefore it could have no bearing upon a policy of reinsurance, unless there was another policy of reinsurance, or a double reinsurance; for it was only the interest of the original insurers that was covered by the reinsurance.[1]

SECTION V.

OF DOUBLE INSURANCE.

Double insurance, although sometimes confounded with reinsurance, is essentially different. By this, the party originally insured becomes again insured; but by reinsurance, the original insurer is insured, and, as we have seen, the original insured has no interest in, and no lien upon this policy. If, by a double insurance, the insured could protect himself over and over again, he might recover many indemnities for one loss. This cannot be permitted, not only because it is opposed to the first principles of insurance, but because it would tempt to fraud, and make it very easy. This effect may be obviated in two ways — one, by considering the second insurance as operating only on so much of the value of the property insured, as is not covered by the first; and then, as soon as the whole value is covered, whether by the first or by subsequent policies, any further insurance has no effect. A second way is, by considering the second insurance as made jointly with the first. Then only as much would be paid on any loss, on many insurances, as on one only; but this payment is divided ratably among all the insurers. All the policies are considered as making but one policy; and, therefore, any one insurer, who pays more than his proportion, may claim a contribution from others who were liable.[2]

In this country, fire policies usually contain express and exact provisions on this subject. They vary somewhat; but, generally, they require that any other insurance must be stated by the

[1] Mutual Safety Ins. Co. *v.* Hone, 2 Comst. 235; S. C. 1 Sandf. 137.

[2] Thurston *v.* Koch, 4 Dall. 348; Craig *v.* Murgatroyd, 4 Yeates, 161; Millaudon *v.* Western Marine & F. Ins. Co. 9 Louis. 27; Peters *v.* Del. Ins. Co. 5 S. & R. 475.

insured, and indorsed on the policy; and it is a frequent condition, that each office shall in that case pay only a ratable proportion of a loss; and it is often added, that, if such other insurance be not so stated and indorsed, the insured shall not recover on the policy. And it has been held that such a condition applies to a subsequent as well as to a prior insurance.[1] Nor will a court of equity relieve if sufficient notice and indorsement have not been made.[2] But it has been held that a valid notice might be given to an agent of the company, who was authorized to receive applications and survey property proposed for insurance.[3]

[1] Harris *v.* Ohio Ins. Co. 5 Ohio, 466; Westlake *v.* St. Lawrence Ins. Co. 14 Barb. 206; Stacey *v.* Franklin Fire Ins. Co. 2 W. & S. 543. But it has been held, that, if the subsequent insurance is declared void in the policy, if there has been a previous insurance, without the knowledge and consent of the insurers, it cannot be set up as evidence of a subsequent insurance, where the first policy provides that a subsequent insurance, without the consent, in writing, of the underwriters thereof, shall be *ipso facto* void. Jackson *v.* Mass. Mutual Fire Ins. Co. 23 Pick. 418. A policy of insurance to the amount of $1,000, say "$700 on stock of books and stationary, and $300 on music, musical instruments, fancy goods, bronze powder, and medicines," contained a covenant, that, if the insured "shall hereafter make any other insurance on the hereby insured premises, he shall, with all reasonable diligence, notify the same to this corporation," so, "or, in default thereof, this policy shall cease and be of no effect;" it was held that the policy became void if any part of the goods were afterwards insured, without notice. Associated Firemen's Ins. Co. *v.* Assum, 5 Maryland, 165.

[2] Carpenter *v.* Providence Washington Ins. Co. 4 How. 185.

[3] Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. 191; Wilson *v.* Genesee Mutual Ins. Co. 16 id. 511; McEwen *v.* Montgomery Ins. Co. 5 Hill, 101. And such notice need not be in writing, unless specially required. Where a policy required notice of further insurance to be given, and the assent of the company to be indorsed on the policy, or otherwise acknowledged and approved by them in writing, it was held that a letter from the secretary of the company, saying, "I have received your notice of additional insurance," was a sufficient acknowledgment and approval in writing. Potter *v.* Ontario Ins. Co. 5 Hill, 147. Where the charter of an insurance company provided, that, if any other insurance should be obtained on any property insured in that company, notice should be given to the secretary, and the consent of the directors obtained, otherwise the policy should be void; and the evidence tended to show that the secretary knew of and advised the second insurance, and that the directors really consented to the same; it was held that written notice and consent were not necessary, and that the evidence was competent to show both. Goodall *v.* New England Mutual Fire Ins. Co. 5 Foster, N. H. 169. A substantial compliance with the by-law requiring the notice of previous insurance, is sufficient. Liscom *v.* Boston Mutual Fire Ins. Co. 9 Met. 205. Where the by-laws of a mutual fire insurance company provided that any policy issued by the company to cover property previously insured, should be void, unless the previous insurance should be expressed in the policy at the time it was issued, it was held that a policy issued by the company, and made in terms subject to the conditions and limitations of the by-laws, in which policy a previous insurance on the property was not expressed, was void, even in the hands of an assignee, without notice of the defect; although the insurers knew of the existence of such prior insurance, and of the intention of the assured that it should remain in force, and assented thereto, and although the policy was prepared by the insurers, and delivered to the assured, as he supposed, pursuant to his said intention, without any knowledge, on his part, that the prior insurance was not mentioned therein, and although the amount insured by the policy, together with the amount of such prior insurance, did not exceed the value of the property insured. Barrett *v.* Union Mutual Fire Ins. Co. 7 Cush. 180. *Fletcher*, J.: "It was said in the argument, that there was a mistake or fault, on the part of the defendants; that the policy was prepared by the defendants; and that they

In some instances, the charter of the company provides that any policy made by it, shall be avoided by any double insurance of which notice is not given, and to which the consent of the company is not obtained, and expressed by their indorsement in the policy.[1] But this would not apply to a non-notice by an insured of an insurance effected by the seller on the house which the insured had bought, if this policy were not assigned to him.[2]

We have seen that several policies insuring the same party on the same interest, are taken to be one policy, and therefore a payment of more than a due proportion gives a claim for contribution. But it seems that this is not the case where there is a clause in the policy like that above mentioned, providing that only a ratable proportion shall be paid by each insurer. For, this clause gives each insurer an adequate defence, if more than his share be demanded; and, therefore, the ground of contribution fails; for this right exists only when two or more are bound severally to pay the whole, and one pays it, or more than his share, by compulsion, and therefore may ask the rest who were bound in the same way, to contribute.[3]

It is a double insurance if both policies cover the same insurable interest, and they are all in the name of the same assured, or, perhaps, all, or a part, are in the name of another, for his benefit. Insurance made by a mortgagee, at the expense of the mortgagor, is a subsequent insurance.[4]

should have expressed in it the prior policy, and omitted to do so by design or by wilful negligence; and that the assured did not read it, but supposed that the prior policy was expressed. The assured certainly had abundant opportunity to read the policy, and need not have accepted it, if it was not satisfactory to him, according to the agreement of the parties. If the assured accepted the policy, without looking at it, or knowing what it was, he would seem himself to be liable to the charge of culpable negligence made against the defendants. But if, from mistake or fraud, an agreement is so defective, that, instead of conveying the meaning of the parties, it express a different or opposite intent, if relief can be given at all, it must be sought exclusively in a court of equity. A court of law must act on the agreement as it is; it cannot strike out or change any part, or add any thing to it, so as to contradict or vary the agreement contained in the written instrument. The parol evidence offered in this case, was therefore clearly not admissible; and taking the policy as it is, the plaintiffs cannot recover." The insured is not bound to give the details of the previous insurance unless they are specially called for. McMahon *v.* Portsmouth Mutual Fire Ins. Co. 2 Foster, N. H. 15.

[1] Stark County Mutual Ins. Co. *v.* Hurd, 19 Ohio, 149.

[2] Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385; Burbank *v.* Rockingham Mut. Fire Ins. Co. 4 Foster, 550.

[3] Lucas *v.* Jefferson Ins. Co. 6 Cow. 635. See also Mutual Safety Ins. Co. *v.* Hone, 2 Comst. 235.

[4] Holbrook *v.* American Ins. Co. 1 Curtis, 193.

SECTION VI.

OF WARRANTY AND REPRESENTATION.

The law of warranty and representation is, in general, the same in fire as in marine insurance. A warranty is a part of the contract; it must be distinctly expressed, and written either in or on the policy, or on a paper attached to the policy, or, as has been held, on a separate paper distinctly referred to and described as a part of the policy. Then, it operates as a condition precedent; and if it be broken, there is no valid contract; nor can it be helped by evidence that the thing warranted was less material than was supposed, or, indeed, not material.[1]

It may be a warranty of the present time or, as it is called, affirmative, or of the future or promissory. And it may be, although of the present and affirmative, a continuing warranty, rendering the policy liable to avoidance by a non-continuance of the thing which is warranted to exist. Whether it is thus continuing or not, must evidently be determined by the nature of the thing warranted. A warranty that the roof of a house is slated, or that there are only so many fireplaces or stoves, would, generally at least, be regarded as continuing; but a warranty that the building was five hundred feet from any other building, would not cause the avoidance of the policy if a neighbor should afterwards put up a house within one hundred feet, without any act or privity of the insured.[2] This subject has, however, been somewhat considered under the topic of alteration.

[1] See *ante*, p. 497, and notes.

[2] Where the insured, on applying for insurance on buildings, promised the underwriters, verbally, that, if they accepted the risk, he would discontinue the use of a fireplace in the basement, and use a stove instead thereof, but, after obtaining the policy, omitted to perform his promise, in consequence of which the building was burned, it was held to be no defence to an action on the policy. Alston *v.* Mechanics' Mutual Ins. Co. 4 Hill, 329. A mere statement in a notice of alterations, by the assured, that a machine put up by them upon the premises, is designed for "burning hard coal," will not be considered an agreement to burn hard coal only, or not to use other fuel, should it become necessary, and can be used without increasing the risk. Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. 570. In the application for insurance, referred to in the policy as forming part thereof, it was stated thus: "There is one stove; pipe passes through the window, at the side of the building. There will, however, be a stove chimney built, and the pipe will pass into it at the side." It seems that this amounted to a warranty that the chimney should be built within a reasonable time. Murdock *v.* Chenango County Mutual Ins. Co. 2 Comst. 210. Statements which are made a part of the policy,

We have seen that statements made on a separate paper, may be so referred to as to make them a part of the policy. And it is usual to refer in this way to the written application of the insured, and to all the written statements, descriptions, and answers to questions, which he makes for the purpose of obtaining insurance. And although there is some indication of distinguishing between the application itself and the conditions on which the policy is made, we see no reason for saying that any statements whatever, made in writing, for the purpose of obtaining insurance, and referred to distinctly in the policy as a part of it, and therein declared to be warranties or conditions on which the policy is made, — are any thing less than positive warranties. But a fair and rational, or, in some cases, a liberal construction will be given to such statements. Thus, where a charter of a company provided that no insurance on any property should be valid to the insured, unless he had a good and perfect and unin-

and are prospective, as, that water casks shall be kept in an upper story, or a watch kept, or an examination made at night, must be substantially complied with. Houghton *v.* Manufacturers' Mutual Fire Ins. Co. 8 Met. 114; Jones Manufacturing Co. *v.* Manufacturers' Mutual Fire Ins. Co. 8 Cush. 82; Hovey *v.* American Mut. Ins. Co. 2 Duer, 554; Glendale Woollen Co. *v.* Protection Ins. Co. 21 Conn. 19; Sheldon *v.* Hartford Fire Ins. Co. 22 id. 235. See *ante*, p. 503, n. 1. Where, by the terms of a policy, a misrepresentation or concealment as to the distance of the building insured from other buildings, avoids it, such misrepresentation or concealment will have that effect. Burritt *v.* Saratoga County Mut. Fire Ins. Co. 5 Hill, 188; Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, 75; Kennedy *v.* St. Lawrence County Mut. Ins. Co. 10 Barb. 285; Wilson *v.* Herkimer County Mut. Ins. Co. 2 Selden, 53; Wall *v.* East River Mutual Ins. Co. 3 id. 370. But if the insurer, with a knowledge of the inaccuracy of the statement, makes and receives assessments of premiums from the insured, he will be estopped from setting it up in defence in a case of loss. Frost *v.* Saratoga Mutual Ins. Co. 5 Denio, 154. But it is held that a misstatement as to the distance of other buildings, which is not material, will not avoid the insurance, where the policy does not specially give it the effect of a warranty. Gates *v.* Madison County Mut. Ins. Co. 2 Comst. 43, 1 Selden, 469, overruling the decision of the Supreme Court, 3 Barb. 73. See Wall *v.* East River Mutual Ins. Co. 3 Selden, 374. The erection by the party insured, without notice to the insurers, of a new building nearly adjoining the building insured, does not invalidate the policy; there being no provision on the subject, and no actual injury having resulted from such erection, although, when the insurance was effected, the building was in contemplation, and preparations for its erection had commenced. Gates *v.* Madison County Mut. Ins. Co. 1 Selden, 469. So, where the assured, upon an application, by a diagram or otherwise, represent the ground contiguous to the premises as "vacant," this does not amount to a warranty that it shall remain vacant during the risk, or prevent the insured himself from building thereon. Stebbins *v.* Globe Ins. Co. 2 Hall, 632. Where the company insured the plaintiff $2,000 on his machine shop, "a watchman kept on the premises," it was held that the stipulation, "a watchman kept on the premises," inserted in the body of the policy just after the description of the property, is in the nature of a warranty, and must be substantially complied with. It does not require a watchman to be kept there constantly, but only at such times as men of ordinary care and skill in like business keep a watchman on their premises. And in an action on such policy, evidence of the usage, in this respect, of similar establishments, is admissible. Crocker *v.* People's Mutual Fire Ins. Co. 8 Cush. 79. See *ante*, pp. 492, 493, and notes.

cumbered title thereto, and unless the true title of the assured be disclosed, and two persons made application for insurance upon a tannery and the stock therein, and were insured jointly; and it turned out that one of them owned exclusively the building, and the other exclusively occupied it and owned the stock, the insurers were held.[1]

It is quite certain that the word warranty need not be used, if the language is such as to import unequivocally the same meaning.[2] And an indorsement made upon the policy before it is executed, may take effect as a part of it.[3]

A statement may be introduced into the policy itself, and be construed, not as any warranty, but merely as a license or permission of the insurers that premises may be occupied in a certain way, or some other fact occur without prejudice to the insurance.[4]

A representation, in the law of insurance, differs from a warranty in that it is not a part of the contract. If made after the signing of the policy or the completion of the contract, it cannot, of course, affect it. If made before the contract, and with a view to effecting insurance, it is no part of the contract; but if it be fraudulent, it makes the contract void. And if it be false, and known to be false by him who makes it, it is his fraud. To have this effect, however, it must be material; and there is no better test or standard for this than the question, whether the contract would have been made, and, in its present form or on its actual terms, if this statement had not been made and believed by the insurers. If the answer is, that the contract would not have been made if this statement had not been made, it is material; otherwise, not.[5]

[1] Peck *v.* New London County Mut. Ins. Co. 22 Conn. 575.

[2] See p. 492, and notes.

[3] Roberts *v.* Chenango County Mutual Ins. Co. 3 Hill, 501.

[4] Catlin *v.* Springfield Fire Ins. Co. 1 Sumn. 434.

[5] Clark *v.* Manufacturers' Ins. Co. 2 Wood. & Minot, 472; Nicoll *v.* American Ins. Co. 3 id. 529. The statements in the application on a separate sheet, have the effect only of representations, and do not avoid the policy unless void in a material point, or unless the policy makes them specially a part of itself, and gives them the effect of warranties. Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72; Snyder *v.* Farmers' Ins. Co. 13 Wend. 92; S. C. 16 id. 481; Delonguemare *v.* Tradesmen's Ins. Co. 2 Hall, 611; Stebbins *v.* Globe Ins. Co. id. 632; Burritt *v.* Saratoga County Mut. Fire Ins. Co. 5 Hill, 190; Murdock *v.* Chenango County Mut. Ins. Co. 2 Comst. 210; Sexton *v.* Montgomery County Mut. Ins. Co. 9 Barb. 200; Kennedy *v.* St. Lawrence County Mut. Ins. Co. 10 id. 285; Williams *v.* New Eng. Mutual Fire. Ins. Co. 31 Maine, 224; Insurance Co. *v.* Southard, 8 B. Monr. 634; Egan *v.* Mutual Ins. Co. 5 Denio, 326.

A representation may be more certainly and precisely proved if in writing; but it will have its whole force and effect if only oral.[1]

In some instances, by the terms of the policies, any misrepresentations or concealments avoid the policy. And it is held that the parties have a right to make such a bargain, and that it is binding upon them; and the effect of it would seem to be to give to representations the force and influence of warranties.[2]

There seems to be this difference between marine policies and fire policies. In the former, a material misrepresentation avoids the policy although innocently made; in the latter, it has this effect only when it is fraudulent. This distinction seems to rest upon the greater capability and therefore greater obligation of the insurer against fire to acquaint himself fully with all the particulars which enter into the risk. For he may do this either by the survey and examination of an agent, or by specific and minute inquiries.[3]

The question whether a statement which is relied upon as a representation, be material, and whether there is or has been a substantial compliance with it, (for this is all the law requires,) seems to be for the jury rather than for the court.[4] But it is not unfrequently determined by the court, as matter of law.[5] And if the jury find the representation to be material, and to be false, the consequence follows as matter of law, and the policy is avoided.[6]

Concealment is the converse of representation. The insured is bound to state all that he knows himself, and all that it imports

[1] 2 Duer on Ins. 644; 1 Arnould on Ins. 489.

[2] Burritt *v.* Saratoga Co. Mutual Fire Ins. Co. 5 Hill, 188; Williams *v.* N. E. Mutual Ins. Co. 31 Maine, 224; Murdock *v.* Chenango Co. Mutual Ins. Co. 2 Comst. 210; Sexton *v.* Montgomery Co. Mutual Ins. Co. 9 Barb. 200; Kennedy *v.* St. Lawrence Co. Mutual Ins. Co. 10 id. 285; Houghton *v.* Manufacturers' Mutual Fire Ins. Co. 8 Met. 114.

[3] Burritt *v.* Saratoga Co. Mutual Ins. Co. 5 Hill, 188; Gates *v.* Madison Co. Mutual Ins. Co. 2 Comst. 49; Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. 214; Insurance Co. *v.* Southard, 8 B. Monroe, 648.

[4] Grant *v.* Howard Ins. Co. 5 Hill, 10; Gates *v.* Madison Co. Mutual Ins. Co. 2 Comst. 43; Percival *v.* Maine M. M. Ins. Co. 33 Maine, 242.

[5] Carpenter *v.* American Ins. Co. 1 Story, 57; S. C. 16 Peters, 495; S. C. 4 Howard, 185; Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25; Houghton *v.* Manufacturers' Ins. Co. 8 Met. 114.

[6] Howell *v.* Cincinnati Ins. Co. 7 Ham. (Ohio,) pt. 1, 284. "The fact is to be settled by the jury, but it must be upon legal and sufficient evidence; and where the evidence is agreed, it is a question of law whether it be sufficient or not to establish the fact." *Putnam*, J., in Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 421.

the insurer to know for the purpose of estimating accurately the risk he assumes. A suppression of the truth has the same effect as an expression of what is false. And the rule as to materiality, and a substantial compliance are the same.[1] And we know no reason why the distinction above-mentioned between fire policies and marine policies as to representation, should not be made for the same reason in regard to concealment.[2] Indeed, in one respect adjudication has gone somewhat further. Where the by-laws of a company provided that a surveyor should always examine, report, &c., and there was a material concealment by the insured, the court say it was the duty of the insurers to examine for themselves, and their neglect shall not be permitted to operate to the injury of the insured; and the judge, delivering the opinion, adds: "I will never agree to extend to them (mutual fire insurance companies,) the law as it has been settled in cases of marine insurance."[3]

[1] Lindenau *v.* Desborough, 8 B. & C. 592; Pim *v.* Reid, 6 Man. & Gr. 1; Columbian Ins. Co. 2 Pet. 49; Clark *v.* Manufacturers' Ins. Co. 8 How. 248. The plaintiff having one of several warehouses, next but one to a boat-builder's shop which took fire, on the same evening, after it was apparently extinguished, sent instructions to his agent by extraordinary conveyance for insuring that warehouse without apprizing the insurers of the neighboring fire. It was held that although the terms of the insurance did not expressly require the communication of this fact, the concealment avoided the policy. Bufe *v.* Turner, 6 Taunt. 338; S. C. 2 Marsh. 46. Where, pending the negotiations for a policy, the insurers expressed an objection to insuring property in the vicinity of gambling establishments, and the applicant knew at the time that there was one on the premises, it was held that if in the opinion of the jury the risk was materially increased by such occupancy, the policy could be avoided. Lyon *v.* Commercial Ins. Co. 2 Rob. (La.) 266. So, it seems that the fact that a particular individual had threatened to burn the premises in revenge for a supposed injury, should be disclosed to the insurer. Curry *v.* Commonwealth Ins. Co. 10 Pick. 537, 542. The rumor of an attempt to set fire to a neighboring building should be communicated. Walden *v.* Louis. Ins. Co. 12 Louis. 135. The insurer should be informed of any unusual appropriation of the building materially enhancing the risk. Clark *v.* Manufacturers' Ins. Co. 8 Howard, 249. Where the plaintiffs underwrote a policy on the household goods and stock in trade of a party, and after being informed that the character of the insured was bad, that he had been insured and twice burnt out, that there had been difficulty in respect to his losses and he was in bad repute with the insurance offices, effected a reinsurance with the defendants without communicating these facts. The property insured was shortly after destroyed by fire. It was held that there had been a material concealment, which avoided the policy, and whether occasioned by mistake or design was immaterial. N. Y. Bowery Ins. Co. *v.* N. Y. Fire Ins. Co. 17 Wend. 359. A pending litigation, affecting the premises insured, and not communicated, will not vitiate the policy. Hill *v.* Lafayette Ins. Co. 2 Gibbs (Mich.) 476.

[2] Burritt *v.* Saratoga Co. Mutual Ins. Co. 5 Hill, 188; Gates *v.* Madison Co. Mutual Ins. Co. 1 Selden, 474, 475; Clark *v.* Manufacturers' Ins. Co. 8 How. 235.

[3] Satterthwaite *v.* Mutual Beneficial Insurance Association, 14 Penn. State, 393. *Burnside*, J.: "The offer was to prove 'that at the time when the application for insurance was made, and the policy granted, the plaintiffs gave to the secretary of the company a statement of the personal property they desired to have insured, and they omitted to state that there was a corn-kiln attached to the mill, in which personal property was deposited — that the fire, which consumed the building, originated in the

Insurers must be understood as knowing all those matters of common information, that are as much within their reach, as in that of the insured; and these need not be especially stated.[1] But any special circumstance, as a great number of fires in the neighborhood, and the probability or belief that incendiaries were at work, should certainly be communicated; and silence on such a point, — especially if the place of business of the insurers was at a considerable distance from the premises, — would operate as a fraud and avoid the policy.[2] And any questions asked must be answered, and all answers must be as full and precise as the question requires. Concealment in an answer to a specific question can seldom be justified by showing that it was not material.[3] Thus, in general, nothing need be said about title. But

corn-kiln. And further, that the secretary and company had no knowledge, when the policy of insurance was issued, or at any time, till after the fire, that there was a corn-kiln attached to the mill; and if they had known that fact, the rate of insurance would have been higher. And that one of the plaintiffs admitted that it was not made known to the company that there was a corn-kiln, when the contract of insurance was effected." The court rejected this offer, and this is the error assigned. If the company had not reserved all subsequent duties of survey and examination to themselves and their own officers, after the application was made for the insurance, there would be some weight in this offer, and it ought to have gone to the jury; but as they have imposed no duty, beyond the application, on the insured, it was the business of the company, before they issued the policy, to see whether the corn-kiln was adjacent to the mill insured, as well as to examine all other buildings adjacent thereto. If the company had made inquiry, and a false statement had been given, it no doubt would have been receivable in evidence. And if given by the plaintiffs, or either of them or their agent, it would have tended to avoid the policy. But the mere omission by the plaintiffs when they made their application to insure grain in the mill, to return the corn-kiln or to say anything about it, when it is well known that there are corn-kilns attached to half or more of the grist and merchant mills in Bucks county, would not excuse the officers of the company, who neglected inquiry, from gross negligence. No men of common prudence would grant a policy on the grain, in a grist or merchant mill, without inquiry into its situation, and the situation of the adjacent buildings. As regards this mutual insurance company, under the rules and regulations, the evidence would have been irrelevant, and the court were right in refusing to receive it."

[1] Clark *v.* Manufacturers' Ins. Co. 8 How. 249.

[2] N. Y. Bowery Ins. Co. *v.* N. Y. Fire Ins. Co. 17 Wend. 359; Walden *v.* Louis. Ins. Co. 12 Louis. 135; Bufe *v.* Turner, 6 Taunt. 338; S. C. 2 Marsh. 46.

[3] Burritt *v.* Saratoga Co. Mutual Ins. Co. 5 Hill, 188; Gates *v.* Madison Co. Mutual Ins. Co. 3 Barb. 73; S. C. 3 Comst. 43. Possibly, it may be inferred from the above authorities, that the concealment must in the case stated in the text, be material in order to avoid the policy, unless the policy specially gives to a concealment the effect of a warranty. But we should say that this fact would, generally at least, be made material by the specific question respecting it, and that the answer would have the effect of a warranty, unless the question were obviously, or on clear evidence, quite irrelevant and unimportant; but this case would not be likely to occur. If there were a provision in the policy, that a certain fact if existing, must be stated, silence in reference to it would be fatal, however immaterial the fact. In Loehner *v.* Home Mut. Ins. Co. 17 Missouri, 256, *Scott*, J., says: "The thirteenth section of the charter provides that, if the assured has a lease estate in the buildings insured, or, if the premises be incumbered, the policy shall be void, unless the true title of the assured and the incumbrances be expressed thereon. There is no question but that the buildings insured were a leaschold estate and that there was an incumbrance on them at the date

if it be inquired about, full and accurate answers must be made.[1]

Where the insurance company has, by the terms of the policy, a lien upon or interest in the premises insured, to secure the premium note, here it is obvious that any concealment of incumbrance or defect of title would operate as a fraud, and defeat the policy.[2] But in all such cases it is probable that specific questions are put respecting the estate and title of the insured.

A requirement that all buildings standing within a certain distance of the building insured, should be stated, might not always be considered as applicable to personal and movable property.[3] Still, an insurance of chattels, described as in a certain place or building, would be held to amount to a warranty that they should remain there; or rather it would not cover them if removed into another place or building, unless perhaps, by some peculiar phraseology, the parties expressed their intention that the insured was to be protected as to this property wherever it might be situated.[4] It is not uncommon to insure goods in

of the policy. The application contains an interrogatory, whose aim was to ascertain whether there was an incumbrance on the premises proposed to be insured, but no response is made to it; leaving room for the inference that none existed. The charter then made the policy void. 2. The plaintiffs were not at liberty to obviate this objection by showing that the agent of the company was informed of the existence of an incumbrance at the time of the application, but that he refused to write down the answer, saying that the incumbrance was too trifling. Independently of the statute, which required the incumbrance to be expressed in the policy at the peril of its being void, there was a memorandum indorsed on it, which made known that the company would be bound by no statement made to the agent not contained in the application. The facts being as represented, they could not give the plaintiffs a right of action on the policy in the teeth of the statute and against the terms of the contract. If the conduct of the agent was such as is alleged, he was guilty of a gross fraud, as is shown by his setting up this defence, which would avoid the policy and give a right of action for the recovery of the premium, but could not, for reasons given, entitle the plaintiffs to an action on the policy.

[1] Where the mortgagor whose right to redeem had been seized on execution, not being specially inquired of as to the state of his title, stated the property to be his own, on the application, this was held to be no material misrepresentation or concealment. Strong *v.* Manufacturers' Ins. Co. 10 Pick. 40; Delahay *v.* Memphis Ins. Co. 8 Humph. 684. So where the store insured stood on the land of another person under an oral agreement, terminable at the pleasure of the owner of the land on six months' notice, no inquiry being made as to the title, the concealment was held not material. Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 419. So where a tenant from year to year insured the building as "his building." Niblo *v.* North American Ins. Co. 1 Sandf. 551; Tyler *v.* Ætna Ins. Co. 12 Wend. 507; S. C. 16 id. 385. But see Catron *v.* Tenn. Ins. Co. 6 Humph. 176; Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25; Carpenter *v.* Washington Ins. Co. 16 id. 495.

[2] Locke *v.* North American Ins. Co. 13 Mass. 67.

[3] Trench *v.* Chenango Co. Mutual Insurance Co. 7 Hill, 122. But the authority of this case is questioned. Wilson *v.* Herkimer Co. Mutual Ins. Co. 2 Selden, 53; Kennedy *v.* St. Lawrence Co. Mutual Ins. Co. 10 Barb. 285. See *ante*, p. 524, n. 3.

[4] Sexton *v.* Montgomery Co. Mutual Ins. Co. 9 Barb. 191.

transitu against fire; but then it is usual to name the termini from which and to which the goods are passing.[1]

SECTION VII.

OF THE RISK INCURRED BY THE INSURERS.

At the time of the insurance, the property must be in existence, and not on fire, and not at that moment exposed to a dangerous fire in the immediate neighborhood; because the insurance assumes that no unusual risk exists at that time.[2]

The risk taken, is that of fire. And therefore the insurers are not chargeable if the property be destroyed or injured by the indirect effect of excessive heat; or by any effect which stops short of ignition or combustion. But if there be actual ignition, the insurers are liable for the immediate consequences; as the injury from water used to extinguish the fire. Or injury to or loss of goods caused by their removal from immediate danger of fire; but not from a mere apprehension from a distant fire, even if it be reasonable; and not if the loss or injury might have been avoided by even so much care as is usually given in times of so much excitement and bustle.[3] In some instances the policies require that the insured should use all possible diligence to preserve their goods; and such a clause would strengthen the claim for injury caused by an endeavor to save them by removal.[4] So the insurers are liable for injury or loss sustained by the blowing up of buildings to arrest the progress of a fire.[5] But we should say that if goods were damaged by water thrown on to extinguish a supposed fire when there was none in fact; or by the wholly unnecessary and useless destruction of a house distant from the fire, the insurers should not be held.

It must now be conceded to modern science, that lightning is

[1] See *ante*, p. 523, n. 1.

[2] Babcock *v.* Montgomery Co. Mutual Ins. Co. 6 Barb. 637, 643; S. C. 4 Comst. 326; Austin *v.* Drewe, 6 Taunt. 436; 4 Camp. 360.

[3] Case *v.* Hartford Fire Ins. Co. 13 Ill. 676; Babcock *v.* Montgomery Co. Mutual Ins. Co. 6 Barb. 640; Hillier *v.* Alleghany Co. Mut. Ins. Co. 3 Barr. (Penn.) 470.

[4] Case *v.* Hartford Fire Ins. Co. 13 Ill. 676.

[5] City Fire Ins. Co. *v.* Corlies, 21 Wend. 367; Pentz *v.* Receivers of Ætna Fire Ins. Co. 3 Edw. c. 341; S. C. 9 Paige, 568; Gordon *v.* Rimmington, 1 Camp. 123.

not fire; and if property be destroyed by lightning, the insurers are not liable, unless there was also ignition.[1]

An explosion, caused by gunpowder, is a loss by fire;[2] not so it is said, is an explosion caused by steam.[3] Scientifically, it might be difficult to draw a wide distinction between these cases; but the difference is sufficient for the law.

Whether, when the negligence of the insured or his servants is to be considered as the sole or direct cause of the fire or loss, the insurers can be held, has been somewhat considered. And as this is the most common and universal danger, and the very one which induces most persons to insure, there has been some disposition to say that no measure or kind of mere negligence can operate as a defence. And in effect this is almost the law.[4] But if the loss be caused by negligence of the insured himself, of so extreme and gross a character, that it was hardly possible to avoid the conclusion of fraud, the defence might be a good one, although there were no direct proof of fraud.[5] That the fire was caused by the insanity of the insured should be no defence.

[1] Babcock *v.* Montgomery Co. Mutual Ins. Co. 6 Barb. 637; S. C. 4 Comst. 326; Kenniston *v.* Mer. Co. Mutual Ins. Co. 14 N. H. 341.

[2] See Grim *v.* Phœnix Ins. Co. 13 Johns. 451.

[3] Millaudon *v.* N. O. Ins. Co. 4 La. Ann. 15, where it was provided by the conditions annexed to a policy of insurance against fire, that the company shall not be liable "for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause unless specially specified in the policy," the company was held not liable, where fire, which was directly and wholly occasioned by an explosion, was the proximate cause of the loss. St. John *v.* American Mutual Fire & Marine Ins. Co. 1 Duer (Sup. Ct.) 371; Same case, 1 Kernan, 516.

[4] Shaw *v.* Robberds, 6 Ad. & El. 75, 83. *Denman*, C. J.: "One argument more remains to be noticed, viz: that the loss here arose from the plaintiff's own negligent act in allowing the kiln to be used for a purpose to which it was not adapted. There is no doubt that one of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore, the simple fact of negligence has never been held to constitute a defence. But it is argued that there is a distinction between the negligence of servants and strangers and that of the assured himself. We do not see any ground for such a distinction, and are of opinion that in the absence of all fraud, the proximate cause of the loss only is to be looked to." This doctrine is now well settled law in this country. Patapsco Ins. Co. *v.* Coulter, 3 Peters, 222; Columbia Ins. Co. *v.* Lawrence, 10 Peters, 517, 518; Waters *v.* Merchants' Louisville Ins. Co. 11 id. 213, 225; Perrin *v.* Protection Ins. Co. 11 Ohio, 147, overruling Lodwicks *v.* Ohio Ins. Co. 5 id. 433; St. Louis Ins. Co. *v.* Glasgow, 8 Missouri, 713; Mathews *v.* Howard Ins. Co. 13 Barb. 234, overruling Grim *v.* Phœnix Ins. Co. 13 Johns. 451; Hynds *v.* Schenectady Co. Mut. Ins. Co. 16 Barb. 119; St. John *v.* American Mut. Fire & Marine Ins. Co. 1 Duer, (Sup. Ct.) 371; Gates *v.* Madison Co. Mutual Ins. Co. 1 Selden, 469; Copeland *v.* New England Ins. Co. 2 Met. 432; Butman *v.* Monmouth Fire Ins. Co. 35 Maine, 227; Catlin *v.* Springfield Fire Ins. Co. 1 Sumner, 434; Henderson *v.* Western Marine & Fire Ins. Co. 10 Rob. (La.) 164.

[5] Chandler *v.* Worcester Fire Ins. Co. 3 Cush. 328. In this case it was held that the assured may be guilty of such gross negligence and misconduct, as although not amounting to a fraudulent intent to burn the building, yet will preclude him from recovering for a loss.

In Beaumont's work on Fire and Life Insurance, he gives some instances drawn from the practice of English Assurance Companies, a part of which at least, rest upon sound principles, and illustrate what is probably the law, although not yet determined by adjudication. Thus, if implements or apparatus used for fire, as ranges, grates, or the like, are destroyed by fire, this loss gives no claim on the insurers. But if the chimney or other parts of the house in which the apparatus is set, is injured by the same fire, for this the insurers are liable. He says also that where the loss is caused only by an excess of the heat or fire which was designedly used, they are not liable.[1] But we should have some doubt as to this rule; especially as applied to clothes hung up to dry, and catching fire from the flame, and the like. Nor are we satisfied that if a haymow takes fire by its own fermentation, it is not a loss within the policy. If quicklime be so heated by water, as to set on fire the barrels or other wood near it, it may be said that the lime itself is not burnt, and might not be hurt by being burnt, and if destroyed by water, is not a loss within the policy. But if lime be put in a building, and set fire to it, and for the purpose of extinguishing this fire, water is so used as to slack the lime and render it valueless, it would be a loss within the policy, unless we say that no loss gives a claim if the thing destroyed contribute to the loss, proximately or remotely. We are aware of no such rule. Thus, if cotton, by fermentation, ignited, and set fire to a mill, undoubtedly the loss of the mill would be within the policy, or the loss of other and disconnected cotton. And we see no good reason for saying that the loss of the very cotton of which the spontaneous combustion caused the fire, should not be within the policy.

There are various exceptions in the policies used in this country; but they have not given rise to much adjudication, and do not, generally, need explanation. It may be remarked, that the exception of "military or usurped power," or any similar phrase, would not be extended so as to cover a common mob.[2] But if the word "riot" be used, insurers are not liable for a fire caused by a tumultuous assemblage, whatever may have been the original purpose of the meeting.[3]

[1] See *ante*, p. 507, n. 3.
[2] Drinkwater *v.* Corporation of London Ass. Co. 2 Wils. 363.
[3] Dupin *v.* Mutual Ins. Co. 5 La. Ann. 482. See Spruill *v.* N. C. Mutual Life Ins.

If the insured be charged with burning the property insured himself, it has been held in England, that this defence could be supported only by evidence which would suffice to convict the plaintiff, if tried upon an indictment.[1] But in this country, it has been ruled otherwise.[2]

SECTION VIII.

OF VALUATION.

Valuation, precisely as it is understood in a marine policy, seldom enters into a fire policy — never, perhaps, in a policy made by any of those mutual companies, who now do a very large part of the insurance of this country. And quite seldom is a building valued when insured by a stock company. If a loss happens, whether it be total or partial, the insurers are bound to pay only so much of the sum insured as will indemnify the assured.[3] But, as care is always taken — and sometimes required by law — to insure upon any house less than its value, it seldom happens, and, if the proper previous precautions are taken, should never happen, that any question arises in case of a total destruction of a building by fire.

But mutual companies are usually forbidden by their charter to insure more than a certain proportion of the value of a building; and this requires a valuation in the policy, which is conclusive, for some purposes, against both parties. Of course the insured can never be held to pay more than the sum insured. And if their charter or by-laws permit a company to insure only a certain proportion of the value, as three fourths, — on the one hand, if the company insure more than that proportion, as $3,500 on property valued at $4,000, they are held to pay only $3,000, and the assured cannot show that the building was really worth more than $4,000.[4] And, on the other hand, the valua-

Co. 1 Jones, (North Car.) 126. An unlawful use of the house, which is not included in the exceptions, where it was not the cause of the fire, does not avoid the policy. Boardman *v.* Merrimack Mutual Fire Ins. Co. 8 Cush. 583.

[1] Thurtell *v.* Beaumont, 1 Bing. 339; S. C. 8 Moore, 612.

[2] Hoffman *v.* Western Marine & Fire Ins. Co. 1 La. Ann. 216; Schmidt *v.* N. Y. Union Mutual Fire Ins. Co. 1 Gray, (Mass.) 529. And evidence of character is not admissible on such an issue. Fowler *v.* Ætna Fire Ins. Co. 6 Cowen, 675; Schmidt *v.* N. Y. Union Mutual Fire Ins. Co. *supra*.

[3] Niblo *v.* North American Fire Ins. Co. 1 Sandf. 551.

[4] Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. 211.

tion, if not fraudulent, is conclusive against the insurers, and they cannot show, in defence, that the building was worth less.[1]

We know nothing to prevent the parties from making a valued policy, if they see fit to do so,[2] although this has been questioned. It is not uncommon for companies who insure chattels,—as plate, pictures, statuary, books, or the like,—to agree on what shall be the value in case of loss.

Sometimes the policy reserves to the insurers the right to have the valuation made anew by evidence, in case of loss. Then if a jury find a less valuation, the insurers pay the same proportion of the new value which they had insured of the former valuation.[3]

The value which the insurers on goods must pay, is their value at the time of the loss. And it has been held, that a fair sale at auction, with due precaution, will be taken to settle that value after the fire, provided the insurers have reasonable notice, or knowledge that the auction is to take place.[4]

SECTION IX.

OF ALIENATION.

Policies against fire are personal contracts between the insured

[1] Borden *v.* Hingham Mutual Fire Ins. Co. 18 Pick. 523; Fuller *v.* Boston Mutual Fire Ins. Co. 4 Metc. 206; Kane *v.* Com. Ins. Co. 8 Johns. 229; Cushman *v.* N. W. Ins. Co. 34 Maine, 487.

[2] In an action on a policy of insurance against fire, on merchandise, among which were 380 kegs of manufactured tobacco, stated on the back of the policy "as worth $9,600," 157 kegs of which were destroyed by fire. The insurance company contended that the plaintiff was entitled to receive only the first cost of the tobacco, together with the cost of manufacturing it, and a reasonable allowance for his attention, and the use and risk of his capital employed, it was held that the insured was entitled to recover for the loss of the 157 kegs, according to the valuation of the whole number of kegs, and not the cost of the tobacco at the manufactory or prime cost; and that where there is an actual or total loss of any article distinctly valued in the policy, that valuation is in the nature of liquidated damages, and must govern in all cases. Harris *v.* Eagle Fire Company, 5 Johns. 368. The late authorities require, that in order to be a valued policy, the sum insured must be stated expressly to be a valuation. Laurent *v.* Chatham Fire Ins. Co. 1 Hall, 41; Wallace *v.* Ins. Co. 4 Louis. 289; Millaudon *v.* Western Ins. Co. 9 id. 32.

[3] Post *v.* Hampshire Mutual Fire Ins. Co. 12 Met. 555.

[4] Hoffman *v.* Western Marine & Fire Ins. Co. 1 La. Ann. 216. The profits which the insured might have made in his business carried on in the building, had no loss occurred, cannot, unless insured as such, be taken into consideration in assessing the damages. Niblo *v.* N. A. Fire Ins. Co. 1 Sandf. 551. The actual value of the building, as such, without reference to its productiveness, or the liability of the insured to be obliged to remove it from a leasehold estate, and thus lessen its value, is the measure of damages. Laurent *v.* Chatham Fire Ins. Co. 1 Hall, 41.

and the insurer, and do not pass to any other party, without the express consent of the insurers.[1]

It is essential to the validity and efficacy of this contract, that the insured have an interest in the property when he is insured, and also when the loss takes place; for otherwise it is not his loss, and he can have no claim for indemnity.[2] If, therefore, he alienates the whole of his interest in the property before the loss, he has no claim; and if he alienates a part, retaining a partial interest, he has only a partial and proportionate claim.[3]

After a loss has occurred, the right of the insured to indemnity is vested and fixed; and this right may be assigned for value, so as to give an equitable claim to the assignee, without the consent of the insurers.[4] But we should not consider a mere assignment or conveyance of the premises, as of itself an assignment of the right to recover on a policy of insurance for a previous loss, unless something in the contract, either of word or fact, showed clearly that this was intended by the parties.

Policies against fire contain a provision, that an assignment of the property, or of the policy, shall avoid the policy. So, generally, it is hardly worth while to inquire what right an assignee, without consent, would acquire at common law, or in equity, where there is no such provision. We think, however, that the weight of authority is strongly, though not conclusively, against his acquiring any claim.[5] There seems to be some difference between fire policies and marine policies, on this subject; the necessity of consent being held more strongly in the case of fire policies;[6] but it is not easy to see a very good reason for this difference.

Where, by the policy itself, a transfer of the interest of the in-

[1] Granger *v.* Howard Ins. Co. 5 Wend. 200; Lane *v.* Maine Mutual Fire Ins. Co. 3 Fairfield, (Maine,) 44; Morrison *v.* Tennessee Marine & Fire Ins. Co. 18 Missouri, 262; Rollins *v.* Columbian Fire Ins. Co. 5 Foster, (N. H.) 204. This doctrine was early held in England. Lynch *v.* Dalzell, 4 Brown, P. C. 431, (1729); Sadler's Co. *v.* Badcock, 2 Atk. 554, (1743.)

[2] Carroll *v.* Boston Marine Ins. Co. 8 Mass. 515; Wilson *v.* Hill, 3 Met. 66.

[3] Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385, 401.

[4] Wilson *v.* Hill, 3 Met. 69; Brichta *v.* N. Y. Lafayette Ins. Co. 2 Hall, 372. But see Lynch *v.* Dalzell, 4 Brown, P. C. 431.

[5] In Smith *v.* Saratoga Mut. Fire Ins. Co. 1 Hill, 500, it is said that the policy, "in its own nature, is assignable so as to pass an equitable interest to the assignee."

[6] Sadler's Co. *v.* Badcock, 2 Atk. 554. Lord *Hardwicke*: "Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there interest or no interest is almost constantly inserted, and if not inserted, you cannot recover, unless you prove a property."

sured is forbidden, it seems to be held, but not uniformly, that this prohibition refers to his interest in the property insured, and not in the contract of insurance.[1]

Nothing is properly an alienation of the property, which is less than an absolute conveyance of the title thereto.[2] But where an insured conveyed half the premises in fee, taking back a lease of the same for five years at a nominal rent, and agreeing to keep and leave the premises in repair, it was held to be to an alienation, although the insured would have been bound, as lessee, to rebuild. Where the insured mortgaged the premises, and assigned the policy to the mortgagee, with the consent of the insurer, before such conveyance, it was held that the policy remained valid as to the mortgagee, and for the amount of the debt, on the ground that the insured could do nothing to affect the rights of the assignee without his privity. In this case it was also held, that payment of an assessment after the property is burned, does not remove the effect of an alienation.[3] A conveyance intended to secure a debt, will be treated in equity as a mortgage, but it does not terminate the interest of the insured.[4] A contract to convey is not an alienation.[5] Nor is a conditional sale, where the condition is precedent, and is not yet performed.[6] Nor is a mortgage, not even after breach, and, perhaps, entry for a

[1] Carpenter *v.* Providence Washington Ins. Co. 16 Peters, 502. Where a policy issued by a mutual fire insurance company contained this clause: "The interest of the assured in this policy is not assignable without the consent of said company in writing, and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void, and of no effect," it was held that this clause did not merely nullify the assignment of the policy, when made without consent, but operated in the policy. Smith *v.* Saratoga Co. Mutual Fire Ins. Co. 1 Hill, 497; 3 id. 508. As to the meaning and effect of the word "assigns," see an interesting case, Holbrook *v.* American Ins. Co. 1 Curtis, 198.

[2] It has been held, that a sale by one joint owner of his interest in the property to the other, does not avoid the policy. Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. 570. But *contra*, Howard *v.* Albany Ins. Co. 3 Denio, 301; Murdock *v.* Chenango Co. Mutual Ins. Co. 2 Comst. 210; Tillou *v.* Kingston Mutual Ins. Co. was overruled in the Court of Appeals, and such sale held to avoid the policy, except where the rights of third parties had intervened. 1 Selden, 405. An assignment by one partner of his interest in the partnership property to the other, is held not to prevent a recovery in case of loss. Wilson *v.* Genesee Mutual Ins. C. 16 Barb. 511. But a dissolution of the partnership before loss, and a division of the goods, so that each partner owned distinct portions, was held to be in violation of a condition against "any transfer or change of title in the property insured." Dreher *v.* Ætna Fire Ins. Co. 18 Missouri, 128. See McMasters *v.* Westchester Co. Mutual Ins. Co. 25 Wend. 379.

[3] Boynton *v.* Clinton & Essex Mut. Ins. Co. 16 Barb. 254.

[4] Holbrook *v.* American Ins. Co. 1 Curtis, 198.

[5] Trumbull *v.* Portage Co. Mutual Ins. Co. 12 Ohio, 305; Masters *v.* Madison Co. Mutual Ins. Co. 11 Barb. 624; Perry Co. Ins. Co. *v.* Stewart, 19 Penn. State, 45.

[6] Tittemore *v.* Vt. Mutual Fire Ins. Co. 20 Vt. 546.

breach, and not until foreclosure.[1] Nor selling and *immediately* taking back.[2] But bankruptcy is said to be an alienation;[3] and if there were a voluntary assignment to assignees in trust, it should operate so, as much as a direct transfer to creditors.[4] There are reasons, however, for drawing a distinction between such a case, and one where the law takes possession of property insured, for creditors; at least, we should say that, in such case, the insurance might remain valid until the assignees or commissioners sold the property.[5] If several estates are insured in one policy, and one or more are aliened, the policy is void as to them only.[6] If many owners are insured in one policy, a transfer by one or more to strangers, without the act or concurrence of the other owners, will avoid the policy for only so much as is thus transferred. And if it be transferred to one or more of the insured, it is, we think, no alienation, and works no forfeiture.[7] But the authorities are not in agreement on this point.

[1] Jackson *v.* Mass. Mutual Fire Ins. Co. 23 Pick. 418; Conover *v.* Mutual Ins. Co. 3 Denio, 254; Rollins *v.* Columbian Ins. Co. 5 Foster, (N. H.) 200. A sale by a master in chancery under a decree of foreclosure, avoids the policy. McLaren *v.* Hartford Fire Ins. Co. 1 Selden, 151. But in Indiana, a mortgage is held to be an alienation, which avoids the policy. M'Culloch *v.* Indiana Mutual Fire Ins. Co. 8 Blackf. 50; Indiana Mutual Fire Ins. Co. *v.* Coquillard, 2 Carter, 645. In Rice *v.* Tower, 1 Gray, (Mass.) 426, it was held, that a mortgage of personal property, without a transfer of possession to the mortgagee, is not such an alienation of the property as will avoid the policy; nor will a seizure of goods on execution, without removing them, have that effect. Where the insurance company insured mortgaged property, and by a memorandum on the policy agreed to pay the amount of insurance, in case of loss, to the mortgagee, with the consent of the mortgagor, and the mortgage was afterwards foreclosed, without any act of the mortgagor, to whom the policy was issued, it was held that the foreclosure did not work an alienation of the property so as to defeat the policy. Bragg *v.* N. E. Mutual Fire Ins. Co. 5 Foster, (N. H.) 289. Where A effected an insurance on property, and afterwards conveyed it to B, who at the same time reconveyed it to a trustee, to secure A the payment of the purchase-money, the policy was not avoided. Morrison *v.* Tennessee M. & F. Ins. Co. 18 Missouri, 262. The conveyance of a moiety of the premises in fee, and taking back a lease for years of the same, was held to avoid the policy. Boynton *v.* Clinton & Essex Mutual Ins. Co. 16 Barb. 254; Abbot *v.* Insurance Co. 30 Maine, 414.

[2] Tittemore *v.* Vt. Mutual Fire Ins. Co. 20 Vt. 546.

[3] In the charter of an insurance company, it was enacted, that if the insured should alienate the property the policy should be void, it was held that an alienation had occurred, when upon his own application he had been decreed a bankrupt, and his assignee in bankruptcy appointed. Adams *v.* Rockingham Mut. Fire Ins. Co. 29 Maine, 292.

[4] And such a conveyance to a trustee for the benefit of creditors, will have the effect of an alienation, although subsequently declared void, on account of fraud. Dadmun Manufac. Co. *v.* Worcester Mutual Fire Ins. Co. 11 Met. 429, 434.

[5] See Bragg *v.* N. E. Mutual Fire Ins. Co. 5 Foster, N. H. 298. The death of the assured does not work an alienation of the property within the meaning of the prohibition in the policy. Burbank *v.* Rockingham Mutual Fire Ins. Co. 4 Foster, 550, 558.

[6] Clark *v.* N. E. Mutual Fire Ins. Co. 6 Cush. 342; Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385.

[7] Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. 570. See *ante*, p. 532, n. 1.

Policies of insurance are not negotiable; that is, not assignable in such way as to give to the assignee a right of action in his own name.[1] But his moral or equitable interest will sustain a promise by the insurers to him, and if such express promise be made, on this he may bring his action.[2] If he brings it in the name of the assignor, it must, generally, at least, be subject to all the defences which the insurers could make against him. It is possible that there should be some qualification of this rule. Undoubtedly, no insured party can make a transfer which shall operate injuriously on the insurers, and yet preserve the rights so transferred. On the other hand, if he, by the terms of the policy, may transfer it with the consent of the insurers, and after such transfer and consent the originally insured fraudulently burns the building, there would be strong reasons for holding the insurance still valid, in favor of the innocent transferree. Perhaps the question would turn upon this: did the transferree pay, or assume the obligation of paying, or guarantee the payment of any premiums. If so, he should be held insured, although the terms of the policy and transfer might oblige him to bring his action in the name of the incendiary. Where possible, such transfer, with such consent, would, undoubtedly, be regarded as a new and independent contract with the transferree.[3]

An alienation, or even actual surrender of the policy, does not avoid the premium note, or the obligation of the insured, to pay his share of the previous losses. If, therefore, after an alienation, the insurers, with full knowledge of it, demand and receive from the insured payments on such account, it is no waiver of the forfeiture.[4] From some cases it would seem, that if the insurers called for and received payments accruing subsequently, it would not revive their obligation, on the ground that the policy is completely annulled by the alienation — that it cannot be revived by any waiver.[5] But we should have much doubt of this.

[1] Lynch *v.* Dalzell, 4 Brown, P. C. 431; Carroll *v.* Boston Marine Ins. Co. 8 Mass. 515; Smith *v.* Saratoga Co. Mutual Ins. Co. 3 Hill, 508; Bodle *v.* Chenango Co. Mutual Ins. Co. 2 Comst. 53; Carpenter *v.* Providence Washington Ins. Co. 16 Peters, 502, 503; Sherman *v.* Fair, 2 Speers, 647; Nevins *v.* Rockingham Fire Ins. Co. 5 Foster, 22.

[2] Rollins *v.* Columbian Fire Ins. Co. 5 Foster, 207.

[3] Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. 573; S. C. 1 Selden, 405. See Wilson *v.* Hill, 3 Met. 69; Boynton *v.* Clinton & Essex Mutual Ins. Co. 16 Barb. 254.

[4] Smith *v.* Saratoga Co. Mutual Fire Ins. Co. 3 Hill, 508. See Wilson *v.* Trumbull Fire Ins. Co. 19 Penn. State, 372.

[5] Neely *v.* Onondaga Co. Mutual Ins. Co. 7 Hill, 49; Boynton *v.* Clinton & Essex Mutual Ins. Co. 16 Barb. 257.

In practice, care should be taken to have all such transfers regularly made and notified, and the consent obtained fully authorized, and duly indorsed or certified, and all the rules or usages of the insurers in this respect complied with.

Where a party insured recovered for a loss caused by a railroad company, for which they were liable, it was held, that this operated as an equitable assignment to the insurers of the claim of the insured against the railroad company; and the insurers might enforce this by a suit in the name of the insured.[1]

SECTION X.

OF NOTICE AND PROOF.

Where the policy requires a certificate of the loss, the production of it is a condition precedent.[2] And it must be such a certificate as is required; but a substantial compliance with its requirements is sufficient.[3] So, too, if the notice is to be given *forthwith*, there must be no unreasonable or unnecessary delay. And all the circumstances of the case are considered, in determining whether there was due diligence or laches.[4] Generally, this is a question for the jury.[5] In fire policies, as the premises may be

[1] Hart *v.* Western R. R. Corporation, 13 Met. 99.

[2] Worsley *v.* Wood, 6 T. R. 710; S. C. 2 Bl. 574; Mason *v.* Harvey, 20 Eng. Law & Eq. 541; S. C. 8 Exch. 819; Columbia Ins. Co. *v.* Lawrence, 10 Peters, 513. It will be no legal justification, if the omission to procure the certificate that the persons from whom it was to be obtained wrongfully refused to give it. Worsley *v.* Wood, *supra;* Leadbetter *v.* Ætna Ins. Co. 13 Maine, 265. In determining the contiguity of the magistrate to the place of the fire, whose certificate is required, the place of his business will be regarded, and a nice calculation of distances will not be made. Turley *v.* North American Fire Ins. Co. 25 Wend. 374.

[3] Norton *v.* Rensselaer & Saratoga Ins. Co. 7 Cow. 645; N. Y. Bowery Fire Ins. Co. *v.* N. Y. Fire Ins. Co. 17 Wend. 359; Sexton *v.* Montgomery Co. Mutual Ins. Co. 9 Barb. 191. It is not necessary to state the nature of his interest in the account of the loss. Gilbert *v.* North American Fire Ins. Co. 23 Wend. 43. The notice may be oral, unless required to be in writing. Curry *v.* Commonwealth Ins. Co. 10 Pick. 536. The manner of the loss, it has been held, need not be stated. Catlin *v.* Springfield Ins. Co. 1 Sumner, 434.

[4] A notice of a loss, which was required by the policy to be given "forthwith," thirty-eight days after a loss, was held insufficient. Inman *v.* Western Fire Ins. Co. 12 Wend. 452. But circumstances may justify a longer delay. Cornell *v.* Le Roy, 9 Wend. 163. Where a certificate is required to be furnished "as soon as possible," it is sufficient if it be furnished within a reasonable time. Columbia Ins. Co. *v.* Lawrence, 10 Peters, 513, 514. See Wightman *v.* Western M. & F. Ins. Co. 8 Rob. (La.) 442; Kingsley *v.* N. E. Mutual Fire Ins. Co. 8 Cush. 393; Hovey *v.* Am. Mutual Ins. Co. 2 Duer, (Sup. Ct.) 554. But where the fire took place in November, and the account of loss was not furnished till the March following, it was held not to be a compliance with the conditions. Edwards *v.* Baltimore Fire Ins. Co. 3 Gill, 176.

[5] Sexton *v.* Montgomery Co. Mutual Ins. Co. 9 Barb. 191.

supposed always open to the inspection of the agents of the insurers, a general notice of the fire will be probably enough.[1]

If the assured has assigned the policy with consent, the assignee may give the notice; and if he does, the neglect of the original insured does not prejudice the assignee.[2]

The insurers may waive their right of notice wholly or partially. And they may do this expressly, or by any acts which fairly indicate to the insured that they accept an imperfect notice given to them, or that they do not need and do not require that any notice should be given,[3] or that they have taken the matter into their own hands, and have made inquiries, and obtained all the information possible.[4] And a refusal "to settle the claim in any way," has been held to supply a good excuse for not offering notice.[5]

The preliminary proofs, though, required by the policy, are not admissible as evidence as to the damages or amount of claim. If it were provided in the policy that they might be so used, this would make them evidence, but we are not aware that this is ever said expressly; and it cannot be inferred from the mere requirement of them.[6]

If the policy provide that the assured shall, if required, submit

[1] Angell on Fire and Life Insurance, § 238.

[2] Cornell *v.* Le Roy, 9 Wend. 163.

[3] Where an account of the loss was required within thirty days, and when the insured furnished one within the proper time, made out under the advice of an agent of the company, and subsequently produced his books for further explanation, at the request of the company, and the company made no objection to his account at that interview, but offered to pay a sum amounting to about three fourths of the loss, a subsequent objection, in general terms, was not allowed to avail for the defence to a suit on the policy. Bodle *v.* Chenango Co. Mutual Ins. Co. 2 Comst. 53. So, where the notice was merely of a loss, but was not objected, and no request for further particulars made by the company, it was held sufficient. Heath *v.* Franklin Ins. Co. 1 Cush. 257; Clark *v.* New England Mutual Fire Ins. Co. 6 id. 342; Underhill *v.* Agawam Mut. Fire Ins. Co. id. 440. It has been held, that a waiver will not be implied where the insurer has given the insured explicit warning that he shall waive nothing, or where the insured could not have removed the objection to the want of proof, if it had been made. Edwards *v.* Baltimore Fire Ins. Co. 3 Gill, 176. See Columbian Ins. Co. *v.* Lawrence, 2 Peters, 53.

[4] Sexton *v.* Montgomery Co. Mutual Ins. Co. 9 Barb. 191; Clark *v.* N. E. Mutual Fire Ins. Co. 6 Cush. 342.

[5] Francis *v.* Ocean Ins. Co. 6 Cowen, 404; Tayloe *v.* Merchants' Fire Ins. Co. 9 How. 390; Allegre *v.* Maryland Ins. Co. 6 H. & J. 408. So where the refusal is put on other grounds, and not on the insufficiency of the notice and preliminary proofs. Vos *v.* Robinson, 9 Johns. 192; Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 401; McMasters *v.* Westchester Co. Mutual Ins. Co. 25 id. 379; O'Neil *v.* Buffalo Fire Ins. Co. 3 Comst. 122; Clark *v.* N. E. Mutual Fire Ins. Co. 6 Cush. 342; Boynton *v.* Clinton & Essex Mutual Ins. Co. 16 Barb. 254. Partial payment of loss is equivalent to a waiver of the preliminary proofs. Westlake *v.* St. Lawrence Co. Mutual Ins. Co. 14 Barb. 206.

[6] Sexton *v.* Montgomery Co. Mut. Ins. Co. 9 Barb. 200.

to an examination under oath, the insurers are not bound by statement under oath; but if he be duly required, and therefore submit himself to an examination under oath, he cannot afterwards be required to submit to further examination under oath.[1]

SECTION XI.

OF ADJUSTMENT AND LOSS.

Insurers against fire are not held to pay for loss of profits, gains of business, or other indirect and remote consequences of a loss by fire. We do not know, however, why profits may not be specifically insured against fire, where it is not forbidden by, or inconsistent with, the charter of the insurers.[2]

There is one wide difference between the principle of adjustment of a marine policy and of a fire policy. In the former, if a proportion only of the value is insured, the insured is considered as his own insurer for the residue, and only an equal proportion of the loss is paid. Thus, if on a ship valued at $10,000, $5,000 be insured, there is a loss of one half, the insurers pay only one half of the sum they insure, just as if some other party had insured other $5,000. But in a fire policy, the insurers pay in

[1] Moore *v.* Protection Ins. Co. 29 Maine, 97.

[2] Under an insurance by the plaintiff, of his "interest in the Ship Inn and offices," it was held that he could not recover for the loss of his business as an inn-keeper in the interval between the fire and the rebuilding. *In re* Wright & Sun Fire Ins. Co. 3 N. & M. 819; S. C. 1 Ad. & El. 621. *Taunton*, J.: "I think that profits are insurable, but they must be insured *quâ profits*. A party is not entitled to compensation for loss of profits under an insurance of his 'interest in the Ship Inn.'" A tenant, from year to year, insured premises used for an armory, a theatre, and other purposes of amusement. The armory was partially, and all the other buildings were destroyed by fire. In a suit on the policy, the assured offered in proof that, by reason of engagements actually existing at the time of the fire with an opera company; with the Ravels, conducting a series of amusements; with the American Institute for an exhibition; with a military company, hiring the armory; and other persons hiring other parts of the premises, he had sustained by the defeating of these engagements, to the extent of the sums insured, and not exceeding the estimated or actual cost of the premises destroyed; it was held that there could be no allowance to the insured for the loss of his business and these interrupted gains; and that one mode of putting the inquiry to the jury, would be this: "How much would a stranger, having no contracts or engagements pending, such as the plaintiffs offered to prove, have given for the unexpired lease when the fire occurred?" Where, by the terms of a policy on goods in public stores, the underwriters agree to make good to the assured all such loss as should happen to the goods by fire, "to be estimated according to the true and actual cash value of the property at the time the loss should happen," the measure of damages is such value, notwithstanding the duties have not been paid or secured. Wolfe *v.* Howard Ins. Co. 3 Selden, 583; S. C. 1 Sandf. 124. Actual and not consequential damages are recoverable. Ellmaker *v.* Franklin Fire Ins. Co. 5 Barr. 183.

all cases the whole amount which is lost by the fire, provided only that it does not exceed the amount which they insure.[1]

It is said that general average clauses or provisions are inserted in fire policies in England, but are not known here. Still, in one case, the principle of general average was applied. Blankets were used by the assured, with the consent of the insurers, to protect a building from a near fire; they did this effectually, but were themselves made worthless, and an action of the insured against the insurers, for this loss, was sustained by the court.[2]

As a contract of fire insurance is an entire one, if the policy ever attaches, there should be no return of premium, although the property be destroyed the day after, and not by fire; as by demolition by whirlwind, or other similar accident.[3] If, however, there were an insurance on goods believed to be at a certain place, at a certain time, and none of them were there, there might be an entire return of premium, because there was never any insurance.[4] But if a part were there, there should be no partial return; because, the rule that where a part only is insured, only a proportionate part is paid by the insurers in case of loss, applies only to marine policies, as stated above.

Most of the fire policies used in this country, give the insurers the right of rebuilding or repairing premises destroyed or injured by fire, instead of paying the amount of the loss. If under this power, the insurers rebuild the house insured, at a less cost than the amount they insure, this does not exhaust their liability; they are now insurers of the new building for the difference between its cost and the amount they have insured. And if the new building burns down, or is injured while the policy contin-

[1] Liscom *v.* Boston Mutual Fire Ins. Co. 9 Met. 211; Trull *v.* Roxbury Mutual Fire Ins. Co. 3 Cush. 267.

[2] But the owners of other buildings in the neighborhood, who may have been protected by the use of the blankets, are too remotely interested to be liable to contribution. Welles *v.* Boston Ins. Co. 6 Pick. 182.

[3] Ellis on Insurance, 23.

[4] Where the representation was made that no lamps were used in the picking-room of the manufactory insured, and lamps had been suspended and occasionally used there for several years, it was held that the policy never attached, and there being no fraud in the representation, the return of the premium was ordered. Clark *v.* Manufacturers' Ins. Co. 2 Wood & Minot, 472, 494. It is held that they have not this right unless it is expressly given. Wallace *v.* Insurance Co. 4 Louis. 289. Where the insurance is on personal property, the same right is given. Franklin Fire Ins. Co. *v.* Hamill, 5 Maryland, 170.

ues, the insured may claim so much as, added to the cost already incurred, shall equal the sum for which he was insured.[1]

There is no rule in fire insurance similar to that which makes a deduction, in marine insurance, of one third, new for old. Still, the jury, to whom the whole question of damages is given, are to inquire into the greater value of a proposed new building, or of a repaired building, and assess only such damages as shall give the insured complete indemnity.[2]

Where insurers had reserved a right to replace articles destroyed, and the insured refused to permit them to examine and inventory the goods, that they might judge what it was expedient for them to do, Chancellor *Walworth* refused to aid the insurers in equity; but such conduct, on the part of the insured, would be evidence to the jury of great weight, to prove an overstatement of loss.[3]

If after the adjustment and payment, there appears to have been fraud in the original contract, or in the adjustment, or material mistake of fact, (but not so if the mistake be of law,) it would seem that money paid may be recovered back.[4]

If the policy contains a provison that any fraud in the claim, or any false swearing or affirmation in support of it, shall avoid the policy, (as is frequently the case in England,) it would seem that it would be left to the jury to say whether there was any material and substantial fraud connected with the matter, and if so, to find for the defence.[5]

From the present state of the authorities, it may be stated, as a general rule, that there are no equities upon the proceeds of policies of fire insurance, in favor of any third parties, unless there be a bargain or contract, or a trust, to that effect.[6]

[1] Trull *v.* Roxbury Mutual Fire Ins. Co. 3 Cush. 263. See N. H. Mutual Ins. Co. *v.* Rand, 4 Foster, N. H. 428. The insured will also be liable for assessments for losses after the destruction of his building by fire, during the whole term of the policy. N. H. Mutual Fire Ins. Co. *v.* Rand, 4 Foster, N. H. 428; Swamscot Machine Co. *v.* Partridge, 5 id. 369.

[2] Brinley *v.* National Ins. Co. 11 Met. 195.

[3] N. Y. Fire Ins. Co. *v.* Delavan, 8 Paige, 419.

[4] Bilbie *v.* Lumley, 2 East, 469; Herbert *v.* Champion, 1 Camp. 134.

[5] Woods *v.* Masterman, Ellis on Insurance, 14; Levy *v.* Baillie, 7 Bing. 349.

[6] A tenant has no equity to compel his landlord to expend money received from an insurance office on the demised premises being burnt down, for rebuilding them, or to restrain the landlord from suing for the rent until the premises are rebuilt. Leeds *v.* Cheetham, 1 Sims. 146. See Brown *v.* Quilter, Ambler, 619.

CHAPTER XX.

LIFE INSURANCE.

SECTION I.

OF THE PURPOSE AND METHOD OF LIFE INSURANCE.

If A insures B a certain sum payable at B's death to B's representatives, we have only the insurer and insured as in other cases. But if A insures B, a sum payable to B or his representatives, on the death of C, although C is often said to be insured, this is not quite accurate; more properly B is the insured party and C is the life-insured.

Life insurance is usually effected in this country in a way quite similar to that of fire insurance by our mutual companies. That is, an application must be first made by the insured; and to this application queries are annexed by the insurers, which relate, with great minuteness and detail, to every topic which can affect the probability of life. These must be answered fully; and if the insured be other than the life-insured, there are usually questions for each of them. There are also, in some cases, questions which should be answered by the physician of the life-insured, and others by his friends or relatives; or other means are provided to have the evidence of the physician and friends.

These questions are not, perhaps, precisely the same, in the forms given out by any two companies; and we do not speak of them in detail here. The rules, as to the obligation of answering them, and as to the sufficiency of the answers, must be the same in life insurance as in fire or marine insurance; or rather must rest upon the same principles. And the same rules and principles of construction, would doubtless be applied to the question whether a contract had been made, or at what time it went into effect.[1]

[1] The case of the Kentucky Mut. Ins. Co. *v.* Jenks, 5 Porter, 96 (Indiana,) is of much interest on this subject. On the 27th of September, 1850, Jenks, of Lafayette Co.

SECTION II.

OF THE PREMIUM.

If the insurance be for one year only, or less, the premium is usually paid in money or by a note at once. If for more than a year, it is usually payable annually. But it is common to provide or agree that the annual payment may be made quarterly, with interest from the day when the whole is due.[1] Notes are usually given; but if not, the whole amount would be considered due. If A, whose premium of $100 is payable for 1856, on the 1st day of January, then pays $25, and is to pay the rest quarterly, dies on the first of February, the $75 due, with interest

being then in good health, completed an application to the Kentucky Insurance Company for an insurance of $1,500 on his life, for the benefit of his wife. The company's agent at Lafayette on that day mailed the application to the company. The application was duly approved, and a policy was issued thereon and mailed to the agent on the 2d October, 1850. It insured the life of J. in the sum of 1,500 dollars, for five years from date, for the benefit of his wife. The policy was received by the agent on the 5th of October, 1850. On the 29th September, 1850, J. was taken sick, and lingering until the 4th October following, died. On the receipt of the policy, (J. being dead,) the agent immediately returned it by mail to the company. While the treaty for insurance was pending, and before J.'s application was completed, the company agreed to take the first year's premium in an advertisement of their agency, for six months, in J.'s newspaper at Lafayette; and accordingly the agent in August, 1850, furnished to J. the advertisement, which was published in the paper continuously thereafter, as directed by the agent, for six months. The price of the advertisement fell short of the first year's premium 45 cents. This was a bill in chancery by J.'s widow, praying discovery of the entries upon the company's books, &c., and that the original application for the insurance, and the original policy issued thereon, should be produced, &c.; that an account should be taken, &c.; and for general relief. And it was held that the contract of insurance was, at least, complete on the 2d of October, 1850, when J.'s application was approved and the policy was mailed to him; and that there was weighty authority that the acceptance related back to the period when J. completed his application.

[1] In Buckee *v.* The United States Insurance Annuity and Trust Company, 18 Barbour, 541, a policy of life insurance contained a provision that in case the quarterly premiums should not be paid on the days specified, the policy should be void; but that in such case it might be renewed, at any time, on the production of satisfactory evidence as to the health of the insured, and payment of back premiums, &c. The premium due on the 10th December, 1851, was not paid until the 16th, when it was received by the insurers, without objection, and entered to the credit of the policy, and a receipt given for it. No evidence was produced in respect to the health of the insured, and none was required. The insured was, in fact, sick at the time, and died on the 19th January, 1852, of the disease under which he was then laboring. It appeared that it had not been the practice of the insurers to exact prompt payment of the premiums, when due, but they had allowed the same to lie over several days, and then accepted them, without objection. *Held,* that the conduct of the insurers had been such as to amount to a waiver of a literal compliance with the condition as to punctual payment; and that the policy not having lapsed or become void, did not require renewal upon a disclosure of the state of the insured's health, within the meaning of that condition. Held also, that such waiver restored the policy to the same condition in which it would have been, had the premium been paid on the precise day when it fell due.

from the 1st of January, would be deducted from the sum insured.

Provision is sometimes made that a part of the premium shall be paid in money, and a part in notes, which are not called in unless needed to pay losses.[1] The greater the accommodation thus allowed, the more convenient it is, obviously, to the insured, and the less certain can he be of the ultimate payment of the policy, because, in the same degree, the fund for the payment consists only of such notes, and not of payments actually made and invested. There is a great diversity among the life insurance companies in this respect. But even the strictest, or those which require that all the premiums shall be paid in money, usually provide also that an amount may remain overdue without prejudice which does not exceed a certain proportion — say one half or one third — of the money actually paid in on the policy. This is considered, under all ordinary circumstances, safe for the company, because every policy is worth as much as this to the company. Or, in other words, it would always be profitable for the company to obtain a discharge of its obligation on a policy by repaying the insured a small proportion of what has been received from him.

SECTION III.

OF THE RESTRICTIONS AND EXCEPTIONS IN LIFE POLICIES.

Our policies usually contain certain restrictions or limitations as to place; the life-insured not being permitted to go beyond certain limits, or to certain places.[2] But there is nothing to pre-

[1] Insurance Co. *v.* Jarvis, 22 Conn. 133.

[2] In Wing *v.* Harvey, 27 Eng. Law & Eq. 140, Bennett, at the instance of his creditor, having procured insurances on the life of his debtor, and one of the conditions of the policies was that, "if the party, upon whose life the insurance is granted, shall go beyond the limits of Europe without the license of the directors, this policy shall become void, the insurance intended to be hereby effected shall cease, and the money paid to the society become forfeited to its use." These policies were duly assigned to Bennett, and notice given to Lockwood, the general agent of the company, at Bury St. Edmunds, through whom the policies had been effected. After the assignments, the premiums were regularly paid by Wing, or his brother in his behalf. In June, 1835, five years after the effecting of the last policy, Bennett infringed on the condition of the policies, by going to live in Canada, where he resided till his death in 1849. Lockwood, applying to Wing for the premiums afterwards, was informed of Bennett's departure, and being inquired of whether it would be safe to pay the premiums under the circumstances, replied that the policies would be perfectly good provided the premiums were regularly paid, and Wing thereupon paid them to Lockwood, who transmitted

vent a bargain permitting the life-insured to pass beyond these bounds, either in consideration of new and further payments, or of the common premium.

So certain trades or occupations, as of persons engaged in making gunpowder, or as engineers or firemen about steam engines, are considered extra-hazardous, and as therefore prohibited, or requiring an extra premium.

The exception, however, which has created most discussion, is that which makes death by suicide an avoidance of the policy. The clause respecting duelling is plain enough; and no one can die in a duel without his own fault. But it is otherwise with regard to self-inflicted death. This may be voluntary and wrongful, or the result of insanity and disease for which the suffering party should not be held responsible. If a policy is accepted, which expressly declares that the sum insured shall not be payable if the life-insured die by his own hands, whether wilfully, knowingly, or intentionally, or otherwise, there is no doubt that this clause would have its full and literal effect. But it might then be very difficult to limit its application. If, for example, a nurse gave a sick man a fatal dose by mistake, and he took the glass in his hand, put it to his lips, drank and died, it might fall within the language of such a provision, but could hardly come within any principle that would be recognized. Most persons

them to the head office of the society. To the successor of Lockwood, who died in 1847, the same inquiries were put, the same reply was received, and the premiums received and transmitted in the same manner. There was some evidence which tended to show that the officers of the company had incidentally become informed of Bennett's residence in Canada. It was held that whether the office had express notice of the forfeiture or not, it was waived by the act of the agents in receiving the premiums paid to them in faith of the policies continuing valid and effectual notwithstanding the departure, and transmitting them to the directors, who retained them without objection. Knight *Bruce*, L. J., said: "If the directors represented by the defendant had themselves personally received the premiums which Mr. Lockwood and Mr. Thompson received, with the same knowledge they had, that would certainly have been a waiver of the forfeiture, and the defence would have been ineffectual; but they were their agents for the purpose of receiving the premiums upon subsisting policies — premiums paid to them upon the faith of the policies continuing valid and effectual, notwithstanding the departure and residence at Canada of the person whose life was insured, — a faith in which Lockwood, and afterwards Thompson knowingly acquiesced, and expressly sanctioned. Those premiums having been, from time to time, transmitted to the directors, and retained by them without objection, I think, whether Lockwood or Thompson informed, or did not inform them in fact, of the true state of the circumstances in which the premiums were paid to them, the directors became and are, as between themselves and plaintiffs, as much bound as if those premiums had been paid by the plaintiff directly to themselves, they knowing at the time, on each occasion, the place of Bennett's residence. The directors taking the money, were or are precluded from saying they received it otherwise than for the purpose and on the faith for which and on which Mr. Wing expressly paid it."

die by their own act, in this sense; because most owe their death to some act or acts of indiscretion or exposure. The insurers may provide against any kind of death, as they may against death by a certain disease, or by a certain cause or in a certain place. The difficult question is, what is the construction and operation of law, where the clause is only "death by his own hands," or some equivalent phrase.

Although strong authorities favor that construction of any clause of this kind, which would avoid the policy if death were actually self-inflicted, although in a state of insanity, the opposite view is also well sustained. And we are of opinion that the general principles of the law of contracts, and of the law of insurance particularly, would lead to the conclusion that "death by his own hands," but without the concurrence of a responsible will or mind, would not discharge the insurers, without a positive provision to that effect. We should put such a death on the same footing with one resulting from a mere accident, brought about by the agency but without the intent of the life-insured. As if, in a case like that above-supposed, poison were sent to him by mistake for medicine, and he swallowed it under the same mistake.[1]

[1] In Borradaile *v.* Hunter, 5 Man. & Grang. 639, the policy contained a proviso, that in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself from Vauxhall Bridge into the Thames, and was drowned. In a suit on the policy, *Erskine*, J., instructed the jury that if the assured, by his own act, intentionally destroyed his own life, and that he was not only conscious of the probable consequences of the act, but did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind to will to destroy his own life, the case would be brought within the condition of the policy. But if he was not in a state of mind to know the consequences of the act, then it would not come within the condition." The jury found that the assured "threw himself from the bridge with the intention of destroying his life; but at the time of committing the act he was not capable of judging between right and wrong." It was held, (Tindal, J., dissenting.) that the policy was avoided, as the proviso included all acts of intentional self-destruction, and was not limited by the accompanying provisos to acts of felonious suicide. *Erskine*, J., said: "Looking simply at that branch of the proviso upon which the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words with reference to the nature of the contract, requires, is, that the act of self-destruction should be the voluntary and wilful act of a man, having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself. It appears, indeed, to me, that, excluding for the present the consideration of the immediate context of the words in question, the fair inference to be drawn from the nature of the contract would be, that the parties intended to include all wilful acts of self-destruction whatever might be the moral responsibility of the assured at the time; for, although the probable results

It was once made a question upon which high authorities differed, whether death by the hands of justice discharged the insurers when the policy made no express provision for this. Perhaps the weight of authority is in the affirmative.[1] But the question

of bodily disease producing death by physical means may be the fair subjects of calculation, the consequences of mental disorder whether produced by bodily disease, by external circumstances, or by corrupted principle, are equally beyond the reach of any reasonable estimate. And reasons might be suggested why those who have the direction of insurance offices should not choose to undertake the risk of such consequences, even in cases of clear and undoubted insanity. It is well known that the conduct of insane patients is, in some degree, under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds where fear of death or of personal suffering might have no influence; and insurers might well desire not to part with this restraint upon the mind and conduct of the assured, nor to release from all pecuniary interest in the continuance of the life of the assured, those on whose watchfulness its preservation might depend; and they might, further, most reasonably desire to exclude from all questions between themselves and the representatives of the assured, the topic of criminality so likely to excite the compassionate prejudices of a jury, which were most powerfully appealed to on the trial of this cause." *Tindal*, C. J., held that the terms "dying by his own hands," being associated with the terms "dying by the hands of justice or in consequence of a duel," which last cases designated criminal acts, on the principle of *noscitur a sociis* should be interpreted as meaning felonious self-destruction. It will be observed the majority of the court in the above case exclude from the condition cases of mere accident, and of insanity extending to unconsciousness of the act done or of its physical consequences. In Clift *v.* Schwabe, 3 M. G. & S. (C. B.) 437, which was determined in the Exchequer Chamber, in 1846, where the condition was that the policy should be void if the life-insured "should commit suicide," it was held by a majority of the court, (Rolfe, B., Patteson, J., Alderson, B., Parke, B.,) that the terms of the condition included all acts of voluntary self-destruction, and therefore if the life-assured voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent. *Pollock*, C. B., and *Wightman*, J., dissented. On the other hand, in New York, in a case decided before the above cases, it was held that a provision in a life policy that it is to be deemed void in case the assured shall "die by his own hand," imports a criminal act of self-destruction, and the underwriters were liable where the assured drowned himself in a fit of insanity. Breasted *v.* The Farmers' Loan and Trust Company, 4 Hill, 73. The decision of the Supreme Court was affirmed in the Court of Appeals, but not with unanimity. Five judges voting for an affirmance, and three for a reversal. The opinion of the majority, delivered by *Willard*, J., and the dissenting opinion of *Gardiner*, J., present the arguments on their respective sides, the latter sustaining the decisions of the English courts. 4 Selden, 299. Where a condition of the policy was, that it shall be void if the party "shall die by his own hand in or in consequence of a duel," it was held to include the case of suicide by swallowing arsenic, and that the first part of the clause is to be separated from the latter, as the whole taken together would lead to an absurdity. Hartman *v.* Keystone Insurance Co. 21 Penn. State, 466.

[1] The Amicable Society *v.* Bolland, 4 Bligh. N. S. 194. In the court below, Bollande *v.* Disney, 3 Russell, Ch. 351. In this — Fauntleroy's case — there was no clause in the policy in regard to death by the hands of justice, but the life-assured was convicted of forgery, sentenced, and executed. The policy was sustained at the Rolls, but upon appeal to the House of Lords, the decree was reversed. *Lyndhurst*, Lord Chancellor, held that a policy expressly insuring against such a risk, would be void on the plainest principles of public policy, as taking away one of the restraints operating on the minds of men against the commission of crime — namely, the interest we have in the welfare and prosperity of our connections — and effect could not be given to it on an event which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void. Where a policy provided that it should be void, if the life-assured "should die in the known violation of a law of the State," it was held that to avoid it, the killing of the life-assured, in an altercation, must have been justifiable or excusable homicide, and not merely under circumstances which would

has now but little practical importance, as our policies always express this exception.

Although a policy express that it shall not take effect until the premium is paid, this payment may be waived by the company. Taking a note would certainly be a waiver, if not a payment. The premiums, after the first, must be paid on the days on which they fall due. If no hour be mentioned, then it is believed that the insurer would have the whole day, even to midnight. It is possible, however, that he might be restricted to the usual hours of business, and perhaps even to those in which the office of the insurers is open for business. In some policies a certain number of days is allowed for the payment of the premium. Then, if the loss happen after the premium is due and unpaid, and during this number of days and before they have expired, but after the loss the premium is paid, the insurers should be bound by a subsequent payment of the premium, by the insured or his representatives, within the designated period.[1] Where this time had elapsed, and the insurers, under their rules, had charged their agent with the amount — not hearing of the default from him, of which it was the agent's duty to notify them immediately, — and the insured, some days afterwards, paid the premium which was received by the agent, it was held that this was not sufficient to renew the policy.[2] This seems to be a harsh and extreme

make the slayer guilty of manslaughter only. Harper *v.* The Phœnix Insurance Co. 18 Missouri, 109. Where a slave refused to surrender to patrols, and attempting his escape, was shot by one of them in the right side, of which wound he died in a few minutes, this was held not to come within the cases excepted in a policy of insurance on his life, of "death by means of invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice." Spruill *v.* N. C. Mutual Life Insurance Co. 1 Jones, (Nor. Car.) 126.

[1] M'Donnell *v.* Carr, Hayes & Jones, (Irish,) 256. But see The Mutual Benefit Life Insurance Co. *v.* Ruse, 8 Georgia, 545. If the language of the policy be such as indicates the intention of the parties that the payment of the premium, during the fifteen days, is to be made by the life-insured personally, or during his life, then if he dies, and the premium is paid by his executors during the fifteen days, the sum insured cannot be recovered of the company. Want *v.* Blunt, 12 East, 183. Where the printed proposals allow a certain time within which the premium may be paid, after it becomes due, and they are not referred to in the policy so as to become a part of the contract, the life-insured dying after the premium becomes due, the executors cannot, by a tender thereof within the time allowed by the proposals, recover on the policy. Mutual Benefit Life Insurance Co. *v.* Ruse, *supra*.

[2] Accy *v.* Fernie, 7 M. & W. 151. Lord *Abinger*, C. B. said: "It seems to me that the provision that he (the agent,) should be debited as if the premium was paid, was to operate as a penalty on him; but does not authorize third persons to take advantage of that which was a mere private arrangement between the company and the agent, for the purpose of insuring the due payment of all moneys which were to be received by him." *Parke*, B., after stating that the agent was not the general agent of the company, but merely an agent with limited powers to receive premiums, said: "It is impossible

case; for if the insurers had themselves received and accepted the money from the insured, there seems no reason for doubting that this would have bound them. Practically, the utmost care is requisite on the part of the assured, to pay his premium before, or as soon as it is due. This is the only proper and safe course. But we believe it to be not unusual for the insurers to accept the premium if offered them a few days after, and continue the policy as if it were paid in season, provided no change in the risk has occurred in the mean time.

The time of the death is sometimes very important. If the policy be for a definite period, it must be shown that the death occurs within it.[1] And the terms of the policy may possibly make it necessary to determine which of two persons lived longest; as, if a sum were insured on the joint lives of two persons, to be paid to the representatives of the survivor. In the cases in which a question of this kind has been raised, there has been some disposition to establish certain presumptions of the law; as that the older survived the younger, or the reverse; or that the man survived the woman.[2] We apprehend, however, that there is not, and cannot be any other presumption of law on the

to consider the debiting of the agent with the amount of the premium as a payment on the original day, according to the allegation in the first count; the only question is, did the company mean to make themselves liable as on a new contract? It seems to me that they did not, and that the meaning of the transaction was merely to keep their agents right, and in case of neglect to be able to come upon agents for the amount of the premium, by way of penalty; but they did not mean thereby to make themselves liable for the amount of the policy. It is only on the ground that they became liable upon a new contract, that any thing can be made of the case on the part of the plaintiff. It appears to me that this was purely a mode of keeping their own agents in order, by holding over them, *in terrorem*, that they should be responsible for the amount of the money not received.

[1] In Lockyer *v.* Offley, 1 T. R. 260, it was said by *Willes*, J.: "Suppose an insurance on a man's life for a year, and some short time before the expiration of the term, he receives a mortal wound, of which he dies after the year, the insurer would not be liable."

[2] 1 Greenl. Ev. § 29. The arbitrary presumptions of the civil law have not been adopted in the common law. In Rex *v.* Dr. Hay, 1 Wm. Black. 640, the case of Gen. Stanwix, who perished, with his wife and daughter, in a vessel which was never heard from, according to Sir Wm. Scott, a compromise was effected on the recommendation of Lord *Mansfield*, who said there was no legal principle on which he could decide it. 2 Phillimore, 268, n. In Mason *v.* Mason, 1 Meriv. 308, where all on board a vessel on a voyage from India, were shipwrecked, and the question was as to the survivorship between a father and son, the rules of the civil law were not accepted, and an issue of fact was directed to the jury. In some cases the comparative age, health, strength, and experience of the parties have been regarded as sufficient to furnish presumptions of survivorship. Sillick *v.* Booth, 1 You. & Collyer, Ch. 121; Coye *v.* Leach, 8 Metc. 375. And where these furnish no decisive tests, the presumption that both died at the same time has been adopted. Taylor *v.* Diplock, 2 Phillim. 261; Selwyn's case, 3 Hagg. Ec. 748; Coye *v.* Leach, 8 Metc. 371; Moehring *v.* Mitchel, 1 Barb. Ch. 264.

subject, than that, after a certain period of absence and silence, there is a presumption of death; and seven years has been mentioned in England and in this country[1] as this period, and even sanctioned by legislation in New York.[2] But all questions of this kind we regard as pure questions of fact. Whichever party rests his case upon death or life, at a certain time, must satisfy the jury upon this point, by such evidence as may be admissible, and relevant.[3] If the presumption of death in seven years is relied upon, it has been supposed that this strongly imports life during that period and death only at the end,[4] unless there be evidence of some particular peril at some definite time; but this may be doubted.[5]

SECTION IV.

OF THE INTEREST OF THE INSURED.

Every one insured in any way, must have an interest in the subject-matter of the insurance. Any one may insure his own

[1] In Loring *v.* Steineman, 1 Metc. 211, *Shaw*, C. J., said: "The only remaining question is a question of fact upon the evidence. It is a well settled rule of law, that upon a person's leaving his usual home and place of residence for temporary purposes of business or pleasure, not being heard of, or known to be living, for the term of seven years, the presumption of life then ceases, and that of his death arises. 2 Stark. Ev. 457; Doe *v.* Jesson, 6 East, 85. But this presumption may be rebutted by counter-evidence. Hopewell *v.* De Pinna, 2 Campb. 113, or by a conflicting presumption. The King *v.* Twyning, 2 Barn. & Ald. 386. This presumption is greatly strengthened, when the departure of an individual from his native place, the seat of his ancestors, and the home of his brothers and sisters and family connexions; and still further, where it was to enter upon the perilous employment of a seafaring life, and when he has not been heard of by those who would be most likely to know of him, for upwards of thirty years." McCartee *v.* Camel, 1 Barb. Ch. 455; Smith *v.* Knowlton, 11 N. H. 196; Cofer *v.* Flanagan, 1 Kelly, (Geo.) 538. This presumption does not arise where the party, when last heard from, had a fixed and known residence in a foreign country. McCartee *v.* Camel, *supra*. *In re* Creed, 1 Drury, Ch. 235.

[2] 2 N. Y. Rev. Stats. c. 34, § 6.

[3] See cases cited in note 1.

[4] Smith *v.* Knowlton, 11 N. H. 196; Burr *v.* Sim, 4 Whart. 150; Bradley *v.* Bradley, id. 173; Tilly *v.* Tilly, 2 Bland, Ch. (Md.) 445.

[5] It is held in England that where a person has not been heard of for seven years, there is no presumption as to the time of his death, and the fact that he died at the expiration of seven years, or at any other time within the seven years, must be proved by the party relying on it. Knight *v.* Nepean, 5 B. & Ad. 86; S. C. 2 M. & W. 894, 913. Lord *Denman*, C. J.: "Now when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of his death." The King *v.* Harborne, 2 Ad. & Ell. 540; *In re* Creed, 1 Drury, Ch. 235. The English doctrine is held in New York. McCartee *v.* Camel, 1 Barb. Ch. 462. See, also, Paterson *v.* Black, 2 Park on Ins. 920, (8th ed.)

life; but if the insured and the life insured are not the same, interest may be shown.[1] The English statutes have been supposed to require this; and although we have no precise legislation on the subject, it must be true in this country, that an insurance of any kind without interest, is a mere wager, and a void contract.

The general rule is, that any substantial pecuniary interest is sufficient, although not strictly legal nor definite. This has been held in the case of a sister, dependent on a brother for support;[2] and the rule would be held to apply not only to all relations, but where there was no relationship, if there were a positive and real dependence.[3]

So, an existing debt gives the creditor an insurable interest in the life of the debtor.[4] But if the debt be not founded on a legal consideration, it does not sustain the policy.[5] And if the debt

[1] Wainewright *v.* Bland, 1 Moody & Rob. 481; S. C. 1 M. & W. 32. But although the policy on its face may appear to have been obtained by the life-assured, if in fact another person, not interested in his life, found the funds for the premiums, and intended, when it was procured, to get the benefit of it by assignment or otherwise, it will be declared the policy of that other person, and void, as an evasion of the statute of 14 Geo. 3, c. 48, §§ 1, 2.

[2] Lord *v.* Dall, 12 Mass. 115, 118. *Parker*, C. J.: "But it is said the interest must be pecuniary, legal interest, to make the contract valid; one that can be noticed and protected by the law; such as the interest which a creditor has in the life of a debtor, a child in that of his parent, &c. The former case, indeed, of the creditor, would have no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For, if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death, to support the child, would never be questioned; although much more should be secured than the legal interest which the child had in the protection of his father. Indeed, we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it."

[3] A wife has an insurable interest in the life of her husband. Reed *v.* The Royal Exchange Assurance Co., Peake's Ad. Cas. 70; St. John *v.* American Mutual Life Ins. Co. 2 Duer, R. 429. In Halford *v.* Kymer, 10 B. & C. 724, it was held that a father cannot in his own name, for his own benefit, insure his son's life, though he may make an insurance on the son's life, in the son's name, and for the son's benefit.

[4] Anderson *v.* Edie, N. P. B. R. 1795; 2 Park on Ins. (8th ed.) 915. In this case, Lord *Kenyon* said: "It was singular that this question had never been directly decided before; that a creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied, might materially depend on it; and that, at all events, the death must, in all cases, in some degree, lessen the security." See comments on this case, in Ellis on Ins. p. 125. It seems that the purchaser of an expected devise from the expectant devisee, may insure the life of the testator. Cook *v.* Field, 15 Q. B. 460. A trustee may insure for the benefit of the trust. Tidswell *v.* Angerstein, Peake, 151; Ward *v.* Ward, 23 Eng. L. & Eq. 442. If A, being indebted to B, die, and C agree to pay the debt, by instalments, in five years, B has an insurable interest in the life of C, for those five years. Von Lindenau *v.* Desborough, 3 C. & P. 353. So, the grantee of an annuity for one or more lives, has an insurable interest in those lives. Holland *v.* Pelham, 1 Cromp. & Jerv. 575.

[5] Dwyer *v.* Edie, 1788; 2 Park on Ins. (8th ed.) 914.

be paid, even after the death of the debtor, but before the sum insured is paid by the insurers, they were, as the law formerly stood, discharged. So they would be on the general principles of insurance, if on any ground, or by any means, the whole risk of the insured is terminated, and he cannot suffer any loss by the death of the life-insured. But recent adjudication in England has unsettled the former rule in regard to this question.[1] In this

[1] The case of Godsall *v.* Boldero, 9 East, 72, has a double interest, as well in the celebrity of the life-insured, as in the severe examination to which it has recently been subjected. The plaintiffs were creditors of the Rt. Hon. William Pitt, and on November 29, 1803, obtained, from the Pelican Life Insurance Company, an insurance on his life for seven years, renewable from year to year for seven years, at an annual premium which was duly paid, and the policy renewed until his death, on January 23, 1806. The debt of Mr. Pitt, at the time the policy was effected, and during the rest of his life, was equal to the sum of £500, and at his decease amounted to £1,109, 11*s.* 6*d.*, which sum, he dying insolvent, was paid to the plaintiffs by his executors, the Earl of Chatham and the Lord Bishop of Lincoln, out of the money granted by parliament for that purpose. The insurance company, against which this suit was brought on the policy, resisted payment, on the ground that the contract of life insurance was one of indemnity, and the plaintiffs, having been fully paid, had been fully indemnified. This defence was sustained. Lord *Ellenborough*, C. J., delivering the judgment, said: "This assurance, as every other to which the law gives effect, (with the exceptions only which are contained in the second and third sections of the statute Geo. 2, c. 27,) is in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering. The interest which the plaintiffs had in the life of Mr. Pitt, was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the statute 14 Geo. 3, c. 48, § 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability, of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interest of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought; and being so founded, it follows, of course, that, if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid, did not (as was the case in the present instance) originally belong to the executors, as a part of the assets of the deceased; for, though it were devised to them *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance is alone maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord *Mansfield*, in Hamilton *v.* Mendes, 2 Burr. 1210. The words of Lord *Mansfield* are: 'The plaintiff's demand is for indemnity; his action, therefore, must be founded upon the nature of the damnification, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or, perhaps, no loss at all. Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for indemnity, where, upon the whole event, no damage has been sustained.' Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of indemnity at the time of the action brought, we are of opinion that a verdict must be entered for the defendant on the first and third pleas, notwithstanding the finding in favor of the plaintiffs on the second plea." The case of Godsall *v.* Boldero, was recognized and approved in several subsequent decisions. Bainbridge *v.* Neilson,

country, life insurance companies sometimes avoid the question, by making it a part of the contract, that the insured creditor

10 East, 344; Tunno *v.* Edwards, 12 id. 493; Barber *v.* Morris, 1 Mood. & R. 62. *Ex parte* Andrews, 1 Madd. 573; Humphrey *v.* Arabin, Lloyd & Goold's Irish Rep. temp. Plunkett, 318; Phillips *v.* Eastwood, id. temp. Sugden, 281; Henson *v.* Blackwell, 4 Hare, 434. It also found a place in Smith's Leading Cases, vol. 2, p. 157, and was there characterized as "established doctrine," and so cited by all the text-writers on the subject of life insurance. Notwithstanding this array of authority in its support, it is no longer law in England. It seems to have been disregarded from the first by the insurance companies, as appears from the evidence of custom, in Barber *v.* Morris, 1 Moody & Ry. 62. Even in the principal case itself, the office is understood not to have availed itself of the verdict, but to have paid the money to the plaintiffs before they left the court. Ellis, 126, note (e.) Its principle was strongly condemned by the learned Professor de Morgan, in his "Essay on Probabilities and their Application to Life Contingencies and Assurance Offices," (Cabinet Encyclopædia, Longman & Co. 1838, pp. 244–248,) who says: "We cannot be too much surprised at the ignorance shown by that judge who declared that life insurance was of its own nature a contract of indemnity." It was finally overruled (Nov. 13, 1854,) by the Court of Exchequer, in Dalby *v.* The India and London Life Assurance Co. 28 Eng. L. & Eq. 312, S. C. 18 Jurist, No. 935. In this case, Rev. John Wright, having an interest in the life of the Duke of Cambridge, to the amount of £3,000, effected four policies of insurance with the Anchor Assurance Company on the duke's life for that amount, and that company effected a policy with the defendants, by way of counter-assurance, for £1,000 of the amount. Mr. Wright afterwards, in consideration of an annuity, surrendered the four policies to the Anchor Assurance Company, and three of them were cancelled; but that company paid premiums to the defendants on the other policy effected with them, until the duke's death. The defendants, being sued by the last-named company on the £1,000 policy, resisted payment, on the ground that the Anchor Assurance Company had no interest in the life-assured at his decease, and the contract of life assurance was one of indemnity. This defence and the case of Godsall *v.* Boldero, were overruled. It was held, (*Parke*, B., delivering the judgment,) that "the contract, commonly called 'life assurance,' when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death, is always (except where bonuses have been given by prosperous offices,) the same on the other. This species of assurance in no way resembles a contract of indemnity." Pages 317, 318. The case of Dalby *v.* The India and London Life Assurance Co. has more recently (Jan. 15, 16, 1855,) been followed and approved on the other side of Westminster Hall, by Vice-Chancellor *Wood*, in an able judgment, overruling Godsall *v.* Boldero. Law *v.* The London Indisputable Life Policy Co. 19 Jurist, 178. The plaintiff, on April 9, 1855, (the date of the policy in dispute,) purchased a contingent legacy of upwards of £3,000, to which his son would be entitled on attaining the age of thirty years. The policy was granted for two years, and would expire April 9, 1852. The son lived to complete his thirtieth year on Jan. 16, 1852, thus fulfilling the contingency, and the legacy was received by the father. The son, singularly enough, died on Jan. 22, six days after attaining the age of thirty. The defendant company, notwithstanding its name and the promises to the contrary, in its prospectus, refused to pay the sum insured, maintaining that the plaintiff's interest ceased on his receiving the legacy. The Vice-Chancellor, overruling this defence, said: "On the main question, I think the case, which has been recently decided in the Court of Exchequer, reversing Godsall *v.* Boldero, completely rules the present. Godsall *v.* Boldero was not a decision which met with universal approbation, and the decision of the Exchequer Chamber places the matter upon what, I confess, appears to me, independent of the high authority of that Court of Appeal, to be the right footing with regard to policies of this description. Policies on fire and on marine risks are policies expressly, in the very words of the policies, made to recompense a loss which the parties may sustain in consequence of the calamities against which the policies are effected; therefore, when that loss is made good *aliunde*, the company are not liable in any way, under the express terms of their contract, in respect of that which

shall transfer to the company an amount of his debt equal to that for which he is insured.

A difficult question arises, when the representatives of the debtor, or a surety or guarantor of the debt, defend themselves on the ground that the debt is paid and fully discharged by the payment under the policy. The cases may not settle this question;[1] nor does the practice, so far as we are aware of it. But we should say, very confidently, that the general principles of all insurance would lead to the conclusion, that by such payment the debt is paid, so far as the creditor is concerned; but that the insurers are subrogated to the rights of the insured, and may prosecute, in his name, but for their own benefit, any action which he might prosecute himself.[2]

has not accrued, namely, loss; but when the question comes to be a question on a life policy, there is no such contract on the policy itself. The policy never refers to the cause or reason for effecting the assignment. The policy is a contract in the simplest form; that, in consideration of an annuity payable annually to the insurer, the insurer will, at the expiration of a particular life, pay a certain sum of money to the insured, who pays those annual payments, which are calculated by the company upon the value which they think ought to be paid, in order to enable them to make the postponed payment. They make no reference to any other circumstance or event; they have founded their calculation upon the probability of the duration of human life, and they get paid the full value of that calculation. On what principle can it be afterwards said, that, because somebody else is good enough to satisfy the object which the insured had in view when he effected the insurance, the insurer should be released from the contract?" These cases, it may be remarked, decide that the interest of the creditor in the life of his debtor, required by the English statute, is only an interest existing when the policy is procured. The overruling of Godsall *v.* Boldero, on both sides of Westminster Hall, is welcomed by the London Jurist, in two recent numbers, with some well-considered remarks. Vol. 18, No. 935, p. 485, Dec. 9, 1854; Vol. 19, O. S. No. 944, p. 37, Feb. 10, 1855. See 39 London Law Mag. O. S. p. 202. There appears to be no American case in which the point at issue in the cases cited was passed upon. That of Craig *v.* Murgatroyd, 4 Yeates, 169, cited in the notes of the American edition to Godsall *v.* Boldero, in Smith's Leading Cases, as confirmatory of that case, involved a marine and not a life insurance. In New York, on the contrary, it is held that, where a debtor procures an insurance on his life and assigns the policy, the right of the assignee to demand and enforce the stipulated payment is no more liable to doubt or dispute than that of an executor or administrator. St. John *v.* American Mutual Life Ins. Co. 2 Duer, (N. Y.) R. 419. In some policies there is a stipulation, that, in case of loss, the insured creditor will assign to the insurance company a portion of the debt equal to the sum received of the company. Cutler *v.* Rand, 8 Cush. 89.

[1] But in Humphrey *v.* Arabin, Lloyd & Goold's Cases, (temp. Plunkett,) 318, it was held, that, if an insured creditor was paid the whole debt by insurers on the life of the debtor, the executor or administrator of the creditor could not require him to abate his claim *pro tanto*, or credit the estate with it. We should say so too; but we should be disposed to add, as in the text, that the whole claim passed over by subrogation to the insurers. Recent decisions, however, leave this in some doubt.

[2] See Henson *v.* Blackwell, 4 Hare, 434. It was held, in Humphrey *v.* Arabin, Lloyd and Goold's Cas. temp Plunkett, 318, that, where there was nothing to raise the relation of trustee and *cestui que trust* between the creditor and debtor in respect to the policy, the debtor cannot avail himself of the payment of the sum insured in a policy.

SECTION V.

OF THE ASSIGNMENT OF A LIFE POLICY.

Life-policies are assignable at law, and are very frequently assigned in practice.[1] A large proportion of the policies which are effected, are made for the purpose of assignment; that is, for the purpose of enabling the insured to give this additional security to his creditor. If the rules of the company or the terms of the policy refer to an assignment of it, they are binding on the parties. On the one hand, an assignment would operate as a discharge of the insurers, to which a rule or expressed provision gave this effect.[2] And, on the other, if the agreement were that the policy should continue in favor of the assignee, even after an act which discharged it as to the insured himself, — as, for example, his suicide, — the insurers would be bound by it.[3]

It is an important question, what constitutes an assignment. The general answer must be, any act distinctly importing an assignment. And, therefore, a delivery and deposit of the policy, for the purpose of assignment, will operate as such, without a formal written assignment. So will any transaction which gives to a creditor of the insured a right to payment out of the insurance.[4]

It seems, however, that delivery is necessary. And where an

[1] Ashley *v.* Ashley, 3 Simon, Ch. 149; Godsall *v.* Webb, 2 Keene, Ch. 99; Barber *v.* Butcher, 8 Q. B. 863; N. Y. Life Ins. Co. *v.* Flack, 3 Maryland, 341. But see *ante*, p. 549, n. 1.

[2] Where, by the terms of a life insurance policy, the company agreed with "the assured, his executors, administrators," to pay the amount to his "legal representatives," after due notice and proof of death, and at the foot of the policy were these words, "N. B. If assigned, notice to be given to the company," it was held that the provision to pay to the "legal representative," was designed to apply only to a case where the party died without having previously assigned, and is not to be construed as in any sense limiting the power of assignment; and further, that the reasons which require the assent of the underwriters as indispensable to the validity of assignments of fire policies, do not apply to insurance on life. N. Y. Life Ins. Co. *v.* Flack, 3 Maryland, 341.

[3] Cook *v.* Black, 1 Hare, 390. And such a provision is not void as illegal or against public policy. Moore *v.* Woolsey, 28 Eng. L. & Eq. 248, 255. But, in order to protect the assignee against acts of the assignor, which would amount to a forfeiture if he were the holder of the policy, there must be this special provision in favor of the assignee. The Amicable Society *v.* Bolland, 4 Bligh, N. S. 194.

[4] *In re* Styan, 1 Phillips, Ch. 105; Cook *v.* Black, 1 Hare, 390; Moore *v.* Woolsey, 28 Eng. L. & Eq. 248; Wells *v.* Archer, 10 S. & R. 412; Harrison *v.* McConkey, 1 Maryland, Ch. 34; N. Y. Life Ins. Co. *v.* Flack, 3 Maryland, 341. The voluntary payment of premiums on a policy of life insurance, gives to the payer no interest in the policy. Burridge *v.* Row, 1 You. & Col. Ch. 183.

assignment was indorsed on the policy, and notice given to the insurers, but the policy remained in the possession of the insured, it was held that there was no assignment.[1] Where, how-

[1] Palmer *v.* Merrill, 6 Cush. 282. In this case, where the sum insured was $1,000, a memorandum was indorsed by the life-assured on the policy, requesting the insurers to pay to the plaintiff, his creditor, the sum of $400, in case of loss on the same, and afterwards the assured, when paying the annual premium, exhibited the policy to the insurers, with the indorsement and request. The policy remained in the custody of the life-insured, and on his decease, came into the hands of his administrator, to whom the company, notwithstanding a previous demand of the plaintiff, paid the amount insured. The estate was insolvent, and this suit was brought against the administrator, to enforce an equitable lien on the sum received by the administrator of the office. The court held that, to sustain the plaintiff's claim, there should have been an assignment of the entire sum due from the insurers, and a manual tradition of the policy to the assignee. *Shaw*, C. J.: "According to the modern decisions, courts of law recognize the assignment of a *chose in action*, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of an assignor, and recover a judgment for his own benefit. But, in order to constitute such an assignment, two things must concur; first, the party holding the *chose in action* must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or *chose in action* arises; and, secondly, the transfer shall be of the whole and entire debt or obligation, in which the *chose in action* consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable. The transfer of a *chose in action* bears an analogy, in some respect, to the transfer of personal property; there can be no actual manual tradition of a *chose in action*, as there must be of personal property, to constitute a lien; but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the *chose in action*, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it, on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in place of the assignor as owner. It appears to us that the order indorsed on this policy, and retained by the assured, fails of amounting to an assignment in both these particulars. We do not question that an assignment may be made of an entire fund, in the form of an order drawn by the owner on the holder of the fund, or party indebted, with authority to receive the property or discharge the debt. But if it be for a part only of the fund or debt, it is a draft or bill of exchange, which does not bind the drawee, or transfer any proprietary or equitable interest in the fund, until accepted by the drawee. It, therefore, creates no lien upon the fund. Upon this point, the authorities seem decisive. Welch *v.* Mandeville, 1 Wheat. 233, S. C. 5 id. 277; Robbins *v.* Bacon, 3 Greenl. 349; Gibson *v.* Cooke, 20 Pick. 15. It seems to us quite clear, that the plaintiff acquired no such interest in this policy, as would enable him to maintain an action against the insurers. He seems himself to have thought so too; for, although he demanded the amount of them, which they refused to pay, for reasons which seem to be conclusive, he yet declined bringing any suit against them, but permitted them to pay the money over to the administrator. If the plaintiff had no such legal or equitable interest in the debt due on the policy, as would enable him to maintain an action or suit in equity, either in his own name or in the name of the administrator of the assignor, for his own benefit, it seems difficult to perceive on what ground he had any equitable lien on the debt due by the policy; and if he had not, then the administrator took it as general assets, charged with no trust for the plaintiff. It appears to us that a contrary doctrine would tend to a great confusion of rights. A man cannot, by his own act, charge a personal chattel, a carriage and horses, for instance, with a lien in favor of a particular creditor, and yet retain the dominion and possession of them till his death; *à fortiori*, when he retains the memorandum or instrument of transfer of such chattel in his own possession and under his own control. It seems to us equally impracticable to charge a debt due to him, by an order or memorandum, retained in his own possession, purporting to give to a particular creditor an equitable

ever, the assignment was by a separate deed, which was duly executed and delivered, this is an assignment of the policy, without actual delivery of it.[1] And a mere verbal promise to assign, a valuable consideration being received for the promise, has been held good as against the insured; and, perhaps, after proper notice, against his assignee in bankruptcy.[2]

This subject of assignment is frequently regulated by the by-laws of the insurers, or by the terms of the policy. Where it is not, we see no reason for saying that the *delictus personarum* does not apply as in other kinds of insurance; and consequently the insurers are discharged if there be an assignment without their knowledge and consent. The cases however do not settle this question, and there are opinions that life insurance is in this respect distinguished from other insurance.[3]

SECTION VI.

OF WARRANTY, REPRESENTATION AND CONCEALMENT.

The general principles on this subject are the same which we have already stated in reference to other modes of insurance. In life policies, however, the questions which must be answered, are so minute and cover so much ground, that no difficulty often

lien, by the assignment of such *chose in action*, without a transfer or delivery of the security by which it is manifested. Such an assignment would not constitute the debtor himself a trustee to the creditors; what trust, then, devolves on the administrator? Were the law otherwise, an administrator, instead of succeeding to the property and rights of his intestate, to be administered and distributed equally amongst all his creditors, might be obliged to dispose of it in very unequal proportions, according to such supposed declaration of trust. These considerations apply with peculiar force to a policy of insurance on the life of the assured himself, on which no money can become due until the death of the assured, at which time all his rights devolve on his personal representative. If, therefore, it is intended to supersede the right of the personal representative, it must be done in the mode required for a complete assignment of the whole contract." It is added in a note to the case, that, it having been suggested in the argument that other facts existed, not appearing in the report, showing that the assignments had been delivered to the respective assignees, at the time, notice thereof given to the company, and assented to by them, expressly or by implication, a new trial was granted, on which the plaintiffs obtained verdicts and judgments.

[1] Fortescue *v.* Barnett, 3 My. & Keene, 36.

[2] Tibbits *v.* George, 5 Ad. & El. 107. See Williams *v.* Thorp, 2 Sim. 257; Gibson *v.* Overbury, 7 M. & W. 557. It is held in Louisiana, that one who has effected insurance on his life, may assign the policy, or a part of it, to a *bonâ fide* creditor; but such assignment will be without effect as to third persons, creditors of the insured, where there was no proof of notice to the assurers before the death of the assured, nor of the acceptance of the assignment by the transferree before that date, and the policy remained in the possession of the assignor. Succession of Risley, 11 Robinson, 298.

[3] N. Y. Life Ins. Co. *v.* Flack, 3 Maryland, 341. See *ante*, p. 553, n. 1; Ellis on Life Ins. 152, 153.

arises except in relation to the answers. One advisable precaution is for the answerer to discriminate carefully between what he knows and what he believes. If he says simply "yes" or "no," or gives an equivalent answer, this is in most cases, at once a warranty, and avoids the policy if there be any material mistake in the reply. But if the answerer adds the words "to the best of my knowledge and belief," he *warrants* only the fact of his belief, or, in other words, nothing but his own entire honesty.[1]

The cases which turn upon the answers to the questions, are very numerous; but they necessarily rest upon the especial facts of each case, and hardly permit that general rules should be drawn from them. Some, however, may be stated.

The first is, that perfect good faith should be observed. The want of it taints a policy at once; and the presence of it goes far to protect one. Thus where the life-insured was beginning to be insane, but was wholly unconscious of it, the policy was not vitiated by the concealment, although two doctors in attendance upon him knew how the case stood.[2]

There is a warranty, or statement, usually making a part of nearly all life policies; it is that the life-insured is in good health. But this does not mean perfect health, or freedom from all symptoms or seeds of disease. It means reasonably good health; and loose as this definition, or rule, may be, it would be difficult to give any other.[3] And if a jury on the whole are satisfied that the constitution of one warranted to be "in good health," is radically impaired, and the life made unusually precarious, there is a breach of the warranty, although no specific disease is shown which must have that effect.[4] On the other hand, this warranty is not broken by the presence of a disease, if that be one which does not usually tend to shorten life — as dyspepsia — unless it were organic, or had increased to that extreme degree, as to be, of itself, dangerous.[5]

[1] Stackpole *v.* Simon, 2 Park on Ins. (8th ed.) 932.

[2] Swete *v.* Fairlie, 6 C. & P. 1. But insanity, if known, should be communicated, or the policy will be avoided by the concealment. Lindenau *v.* Desborough, 8 B. & C. 586; S. C. 3 C. & P. 353.

[3] Ross *v.* Bradshaw, 1 W. Black, 312.

[4] Aveson *v.* Kinniard, 6 East, 188.

[5] Watson *v.* Mainwaring, 4 Taunt. 763. *Chambre*, J.: "All disorders have more or less a tendency to shorten life, even the most trifling; as for instance, corns may end in a mortification; that is not the meaning of the clause; if dyspepsia were a disorder

Consumption is the disease which is most feared in this country as well as in England. And the questions which relate to the symptoms of it, as spitting of blood, cough, and the like, are exceedingly minute. But here also there must be a reasonable construction of the answers. Thus, if spitting of blood be positively denied, there is no falsification in fact, though literally speaking, the life-insured may have spit blood many times, as when a tooth was drawn, or from some accident. The question usually put to the jury is, was the party affected by any of these or similar symptoms, in such wise that they indicated a disorder tending to shorten life. And any symptom of this kind, however slight — as a drop or two of blood having ever flowed from inflamed or congested lungs — should be stated.[1]

that tended to shorten life within this exception, the lives of half the members of the profession would be uninsurable." In this case the jury had found that the dyspepsia was neither organic nor excessive, and the court refused to set aside the verdict for the plaintiff. See N. Y. Life Ins. Co. *v.* Flack, 3 Maryland, 356, where it is said, "We cannot see how a person can be sound and healthy who is predisposed to dyspepsia to such a degree as to produce bodily infirmity." Where the insured was troubled with spasms and cramps from violent fits of the gout, but was in as good health when the policy was underwritten as he had been for a long time before, and the underwriters had been told that he was subject to the gout, Lord *Mansfield* said: "The imperfection of language is such that we have not words for every different idea; and the real intention of parties must be found out by the subject-matter. By the present policy, the life is warranted, to some of the underwriters, in health, to others in good health; and yet there was no difference intended in point of fact. Such a warranty can never mean that a man had not the seeds of disorder. We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract."

[1] In Vose *v.* Eagle Life and Health Ins. Co. 6 Cushing, 42, an applicant for life insurance answered an interrogatory, whether he had ever been afflicted with a pulmonary disease, in the negative; and in answer to an interrogatory, whether he was then afflicted with any disease or disorder and what, stated, that he could not say whether he was afflicted with any disease or disorder, but that he was troubled with a general debility of the system; and it was proved that the applicant was then in a consumption, the symptoms of which had begun to develop themselves five months before, and were known to him; but were not disclosed to the insurers, although sufficient to induce a reasonable belief on the part of the applicant, that he had such a disease. It was held that whether these statements amounted to a warranty or not, they were so materially untrue as to avoid the policy, although the insured, at the time of his application, did not believe that he had any pulmonary disease, and the statement made by him was not intentionally false, but according to his belief, true. According to the opinion delivered in the case, the proposal or declaration when forming a part of the policy has been held to amount to a condition in warranty which must be strictly complied with and upon the truth of which whether a misstatement be intentional or not, the whole instruments depends; where there is no warranty, an untrue allegation of a material fact, or the concealment of a material fact when a general question is put by the insurers at the time of effecting the policy, which would elicit it, will vitiate the policy, although such allegation or concealment be the result of accident or negligence and not of design; where the agent for receiving the application and forwarding it to the directors of the company at their place of business, by whom the contract and policy are made and signed on the basis of the application, had reasonable cause to believe that the party was laboring under a pulmonary disease, this does not cure the effect of the untrue statement. Geach *v.* Ingall, 14 M. & W. 95. In this case the life-assured

The insurers always ask who is the physician of the life-insured, that they may make inquiries of him if they see fit. And

stated in his declaration, that he was at that time in good health, and not afflicted with any disorder, nor addicted to any habit, tending to shorten life; that he had not any time had among other things any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs. One of the terms of the policy was that it should be void if anything stated by the assured in the declaration should be untrue. The defendants' witnesses proved that about four years before the policy was effected, the assured had spit blood, and had subsequently exhibited other symptoms usual in consumptive subjects; and it appeared that he died of consumption in the year 1843. The Lord Chief Justice told the jury that it was for them to say whether at the time of his making the statement set forth in the declaration, the assured had such a spitting of blood, and such affection of the lungs and inflammatory cough, and such a disorder as would have a tendency to shorten his life. This was held a misdirection, for although the mere fact of the assured having spit blood would not vitiate the policy, the assured was bound to have stated that fact to the insurance company in order that they might make inquiry whether it was the result of the disease called spitting of blood. *Alderson*, B.: "Then as to the misdirection, my Lord Denman certainly does not appear to have sufficiently called the attention of the jury to the distinction between those disorders, respecting the existence of which, at the time of executing the policy, the assured was called on to make a specific declaration, and those which might have formerly existed. By 'spitting of blood' must, no doubt, be understood a spitting of blood as a symptom tending to shorten life; the mere fact is nothing. A man cannot have a tooth pulled out without spitting blood. But, on the other hand, if a person has an habitual spitting of blood, although he cannot fix the particular part of his frame whence it proceeds, still as this shows a weakness of some organ which contains blood, he ought to communicate the fact to the insurance company, for no one can doubt that it would most materially assist them in deciding whether they should execute the policy; and good faith ought to be kept with them. So if he had had spitting of blood only once, but that once was the result of the disease called spitting of blood, he ought to state it, and his not doing so would probably avoid the policy. Again, suppose this man had an inflammation of the lungs, which had been cured by bleeding, many physicians would perhaps say, that it was an inflammation of the lungs of so mitigated a nature as not to tend to shorten life; still that would be no answer to the case of the defendants, for it is clear that the company intended that the fact should be mentioned. As to the word 'cough,' it must be understood as a cough proceeding from the lungs, or no one could ever insure his life at all; and indeed it is so expressed in the policy — 'Cough or other affection of the lungs.' Again, it is obvious that the insurance company meant to guard against the disease of dysentery. Now, a man may have had the dysentery, and been cured of it, still the office should know of it; and, indeed, that disorder may have been mentioned by name, as being one of a nature likely to return. All these instances show that it was not intended to restrict the statement of the assured to disorders having a tendency to shorten life at the moment of executing the policy; what the company demanded was, a security against the existence of such diseases in the frame. There must, therefore, be a new trial." *Rolfe*, B.: "I have no doubt, that, if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it. The fact should be made known to the office, in order that their medical adviser might make inquiry into its cause." In Anderson *v.* Fitzgerald, 24 Eng. Law & Eq. 1, determined finally by the House of Lords, the assured proposed his life for insurance, and signed a "proposal," which contained his answers to twenty-seven questions, the twenty-first and twenty-second of which were as follows: "21. Did any of the party's near relations die of consumption, or any other pulmonary complaint? Answer. No. 22. Has the party's life been accepted or refused at any office, &c. Answer. No." The proposal also contained the following agreement: "I hereby agree that the particulars mentioned in the above proposal, shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance, shall become forfeited and the policy be void." The policy contained a warranty on the part of the

this question must be answered fully and accurately. It is not enough to give the name of the usual attendant; but every physician really consulted should be named, and every one consulted as a physician, although he is an irregular practitioner, or quack.[1]

If the warranty be that the life-insured is a person of sober and temperate habits, it has been held, that the jury are not to inquire whether his habits of drinking — if they are proved — are such as might injure his health; because the insurers have a right to say that they will insure only those who are temperate.[2] But it might be answered that although the insurers have this right, and there may be good reasons why this should be the general practice, yet unless they use the word "abstinence" or

assured as to most of the facts replied to in the proposal, but those as to questions 21 and 22 were omitted therein. It then provided that the policy should be null and void, and all moneys paid by the assured forfeited, upon his dying, in certain enumerated modes, or if any thing so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised upon the said company, or any false statement made to them in or about the obtaining or effecting of this insurance. The answers to questions 21 and 22 were proved to be untrue. It was held by the House of Lords, reversing the decisions of the Courts of Exchequer and Exchequer Chamber in Ireland, that the judge was wrong in directing the jury, that if they found the statements both false and material, they should find the verdict for the defendant; and that the question which the judge ought to have left to the jury were, first, were the statements false, and secondly, were they made in obtaining or effecting the policy. The ground of the decision was that the insurers had stipulated that the policy should be void unless the assured should answer certain questions correctly, and thereby excluded the question of materiality. Lord St. Leonards, in opposition to Baron Parke and Lord Brougham, thought the word, "false statement," in the connection, meant a statement untrue within the knowledge of the party making it, and not merely one which was in fact untrue,— but on the ground that a circumstance material to the insurance had not been truly stated, concurred in the motion. See Duckett *v.* Williams, 2 Cr. & M. 348; S. C. 4 Tyrwh. 240. In this case it was agreed in the declaration signed by the assured previous to effecting the policy that if any untrue averment was contained therein or if the facts required to be set forth in the proposal annexed were not truly stated, the premiums should be forfeited and the assurance absolutely null and void. The statement as to the health of the life, was untrue in point of fact but not to the knowledge of the party making it. It was held, that the want of knowledge was immaterial, and the premiums were forfeited. It being provided in the conditions of insurance that any untrue or fraudulent allegation made in effecting the insurance will render the policy void, it was held that the representation by the insured that he was a farmer, whereas he was at the time a slave-taker by occupation, rendered the policy void, and it is not material that his death was not occasioned by his business of slave-taking. Hartman *v.* Keystone Insurance Co. 21 Penn. State, 466, 476.

[1] Morrison *v.* Muspratt, 4 Bing. 60; Everett *v.* Desborough, 5 id. 503; Lindenau *v.* Desborough, 8 B. & C. 586; Huckman *v.* Fernie, 3 M. & W. 505. Where A insures the life of a third person, he is bound by the misrepresentations of the life-assured although himself ignorant that they were false. Maynard *v.* Rhodes, 5 Dow. & Ry. 266; S. C. 1 C. & P. 360. But he is not bound by the concealment of facts by the life-assured, of which he himself is ignorant, which are not called for by a general or particular question, unless the life-assured is his general agent to effect the policy. Huckman *v.* Fernie, 3 M. & W. 505. So if the third person is himself unconscious of concealing facts. Swete *v.* Fairlie, 6 C. & P. 1.

[2] Southcombe *v.* Merriman, Car. & Marsh, 286.

something equivalent, they have no right to say that any one is not "temperate," who does not drink enough to affect his health; for certainly all "intemperance" does this.

An answer, "not subject to fits," is not necessarily falsified by the fact that the life-insured has had one or more fits. But if the question had been "have you ever had fits," then any fit of any kind, and however long before, must be stated.[1]

In general, as there is always a general question as to any facts affecting health not particularly inquired of, a concealment of such a fact goes to a jury, who are to judge whether the fact was material, and whether the concealment were honest.[2] As when a life-insured was a prisoner for debt, and so without the benefit of air and recreation;[3] and where a woman whose life was insured, had become the mother of a child under disgraceful circumstances, these facts were submitted to a jury.[4]

If the policy and the papers annexed or connected, put no limits on the location of the life-insured, he may go where he will. But if, when applying for insurance, he intends going to a place of peculiar danger, and this intention is wholly withheld, it would be a fraudulent concealment.[5]

If facts be erroneously but honestly misrepresented, and the insurers, when making the policy, knew the truth, the error does not effect the policy.[6] Nor does the non-statement of a fact which diminishes the risk; or concerning which there is an express warranty.[7]

If upon a proposal for a life insurance and an agreement thereon, a policy be drawn up by the insurers, and presented to the insured and accepted by them, which differs from the terms of the agreement, and varies the rights of the parties concerned, equity will interfere and deal with the case on the footing of this agreement and not of the policy; unless it seems, from the evidence and circumstances, that it was intended by the insurers to

[1] Chattock *v.* Shawe, 1 Mood. & Rob. 498.
[2] Lindenau *v.* Desborough, 3 C. & P. 353; S. C. 8 B. & C. 586; Morrison *v.* Muspratt, 4 Bing. 60; Everett *v.* Desborough, 5 id. 503; Dalglish *v.* Jarvie, 2 Mac. & Gordon, 243.
[3] Huguenin *v.* Rayley, 6 Taunt. 186.
[4] Edwards *v.* Barron, Ellis, 116.
[5] Lord *v.* Dall, 12 Mass. 119.
[6] Carter *v.* Boehm, 3 Burr, 1910.
[7] Haywood *v.* Rodgers, 4 East, 590. Anderson *v.* Fitzgerald, 24 Eng. Law & Eq. 6, Parke, B.

vary the agreement, and propose a different policy to the insured, and this was understood by the insured, and the policy so accepted.[1]

SECTION VII.

INSURANCE AGAINST DISEASE AND AGAINST DISHONESTY OF SERVANTS.

Of late years both of these forms of insurance have come into practice; but not so long or so extensively as to require that we should speak of them at length. In general, it must be true, the principles already stated as those of insurance against marine peril, or fire, or death, must apply to these other — and indeed to all other — forms of insurance, excepting so far as they may be qualified by the nature of the contract.

From one interesting case which has occurred in England, it seems that when an application was made for insurance, or guaranty, against the fraud or misconduct of an agent, questions are proposed, as we should expect, which are calculated to call forth all the various facts illustrative of the character of the agent; and all which could assist in estimating the probability of his fidelity and discretion. But a declaration of the applicant as to the course or conduct he was to pursue, was distinguished from a warranty. He may recover on the policy, although he changes his course, provided the declaration was honest when made, and the change of conduct was also in good faith. In this case the application was for insurance of the fidelity of the secretary of an institution. There was a question as to when, and how often the accounts of the secretary would be balanced and closed; and the applicant answered that these accounts would be examined by the financial committee once a fortnight. A loss ensued from the dishonesty of the secretary; and it appeared to have been made possible by the neglect of the committee or the directors to examine his accounts in the manner stated in the policy. But the insurers were held on the ground that there was no warranty.[2]

[1] Collett *v.* Morrison, 12 Eng. Law & Eq. 171; S. C. 9 Hare, 162.

[2] Benham *v.* United Guarantee and Life Insurance Co. 14 Eng. Law & Eq. 524; S. C. 7 Exch. 744. See, also, Bunyon on Life Insurance, chapter 6.

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